Supreme Court, U.S.
FILED
04 115 JUL 20 2004
OFFICE OF THE CLERK

No. ____

In the

Supreme Court of the United States

CARSON HARBOR VILLAGE, LTD.,
a Limited Partnership, dba Carson Harbor
Village Mobile Home Park,

Petitioner,

v.

CITY OF CARSON, a Municipal Corporation;
CARSON CITY MOBILEHOME PARK
RENTAL REVIEW BOARD; and CARSON HARBOR
VILLAGE MOBILEHOME PARK HOMEOWNERS
ASSOCIATION, Real Party in Interest,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID SPANGENBERG
Of Counsel
Law Office of David Spangenberg
420 Hudson Street, Suite A
Healdsburg, California 95448
Telephone: (707) 473-4340
Facsimile: (707) 473-0656

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

QUESTIONS PRESENTED

This case involves a regulatory takings claim brought under the Fifth Amendment and 42 U.S.C. § 1983. The Ninth Circuit Court of Appeals ruled that the claim was not ripe for federal adjudication because Petitioner had not attempted to obtain just compensation through state procedures, as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. The questions presented are:

1. Whether the court of appeals erred in holding—contrary to the rule of the Fourth, Fifth, Seventh, and Eleventh Circuits—that Petitioner must ripen its Fifth Amendment takings claim by first pursuing just compensation in the California state courts, when the courts of that state have previously denied compensation in factually indistinguishable cases, and the state's supreme court has held that inverse condemnation is not available for this class of takings claims?

2. Whether the court below erred in holding that *Williamson County* requires Petitioner to ripen its Fifth Amendment takings claim by pursuing state procedures that cannot lead to payment of just compensation by the government, but hold out the untested prospect of obtaining offsetting revenues from private third parties who were in no way responsible for the government's confiscatory actions?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE GRANTED 4

I. THIS COURT'S *WILLIAMSON COUNTY* DECISION SHOULD NOT BE INTERPRETED TO BAR FEDERAL TAKINGS CLAIMANTS FROM ACCESS TO FEDERAL COURTS WHEN, AS IN THIS CASE, THE STATE COURTS DO NOT PROVIDE AN INVERSE CONDEMNATION REMEDY 4

II. THIS COURT MUST RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO WHETHER *WILLIAMSON COUNTY* REQUIRES A FEDERAL TAKINGS CLAIMANT TO SUBMIT TO ADJUDICATION BY STATE COURTS THAT HAVE HELD THAT COMPENSATION IS NOT AVAILABLE UNDER THE FACTS OF THE CASE 12

TABLE OF CONTENTS—Continued

Page

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION LEFT UNANSWERED IN *SUITUM V. TAHOE REGIONAL PLANNING AGENCY*—WHETHER THE FIFTH AMENDMENT'S MANDATE OF JUST COMPENSATION CAN BE SATISFIED BY PROCEDURES THAT HOLD OUT THE PROSPECT OF RECOVERY *NOT* FROM THE GOVERNMENT, BUT FROM THIRD PARTIES WHO BEAR NO RESPONSIBILITY FOR THE TAKING 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon,
598 P.2d 25 (Cal. 1979) 5

Brown v. Board of Education,
347 U.S. 483 (1954) 6

Carson Harbor Village, Ltd. v. City of Carson,
353 F.3d 824 (9th Cir. 2004) 1

Coniston Corp. v. Village of Hoffman Estates,
844 F.2d 461 (7th Cir. 1988) 13

Corn v. City of Lauderdale Lakes,
816 F.2d 1514 (11th Cir. 1987) 13

Felder v. Casey, 487 U.S. 131 (1988) 11

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,
482 U.S. 304 (1987) 6-7

Galland v. City of Clovis,
16 P.3d 130 (Cal. 2001) 10-11

Hensler v. City of Glendale,
876 P.2d 1043 (Cal. 1994) 6

Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851 (Cal. 1997) 3, 5, 8,10,

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 7

Mola Development Corp. v. City of Seal Beach,
57 Cal. App. 4th 405, 67 Cal. Rptr. 2d 103,
(Cal. 4th Dist. Ct. App. 1997) 9

TABLE OF AUTHORITIES—Continued

Page

Montclair Parkowners Association v. City of Montclair, 76 Cal. App. 4th 784, 90 Cal. Rptr. 2d 598 (Cal. 4th Dist. Ct. App. 1999) 14

Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F. Supp. 1068, (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994) 13

Rolf v. City of San Antonio, 77 F.3d 823 (5th Cir. 1996) 13

Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991) 13

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 3, 15, 16

United States v. Dickinson, 152 F.2d 865 (4th Cir. 1946) 17

Williamson County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 2-4, 7

Yee v. Mobilehome Park Rental Review Board, 62 Cal. App. 4th 1409, 73 Cal. Rptr. 2d 227 (Cal. 4th Dist. Ct. App. 1998) 14

Statutes

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983. i

Codes

Cal. Code of Civ. Proc. § 1094.5(b) 7

Carson Municipal Code, Ch. 7 1

TABLE OF AUTHORITIES—Continued

Page

Supreme Court Rules

Rule 13.1 1

Miscellaneous

Breemer, J. David, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, (2003) 7, 12

Browne, Sharon L., *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 Pepp. L. Rev. 99 (1994): 7, 9

Roberts, Thomas E., *Fifth Amendment Takings Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479 (1992) 12-13

Salzberg, Kenneth, *"Takings" as Due Process, or Due Process as "Takings"?*, 36 Val. U. L. Rev. 413 (2002) 17

PETITION FOR WRIT OF CERTIORARI

Petitioner Carson Harbor Village, Ltd. (CHV), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on January 2, 2004.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824 (9th Cir. 2004), and is reproduced as Appendix (App.) A. The Order of the court of appeals denying CHV's petition for rehearing and for rehearing en banc is unreported and is reproduced as Appendix C. The Order of the United States District Court for the Central District of California is unreported and is reproduced as Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals which is the subject of this petition was filed and entered on January 2, 2004. App. A. The order of the Ninth Circuit denying CHV's petition for rehearing was entered on March 22, 2004. App. C. A 30-day extension of time to file this petition was granted by this Court on May 17, 2004. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part, "private property [shall not] be taken for public use, without just compensation."

The City of Carson's Mobilehome Space Rent Control Ordinance, as codified at Chapter 7 of the Carson Municipal Code, is reproduced as Appendix D.

STATEMENT OF THE CASE

Under *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), plaintiffs who have suffered an uncompensated taking of property may not assert their Fifth Amendment rights in federal court until they have pursued just compensation through state procedures—provided that such procedures are *available* and *adequate*. *Id.* at 194-95 (emphasis added). This case presents the issue of state compensation procedures so attenuated and roundabout that they cannot in good conscience be deemed an *adequate* remedy for a taking within the meaning of *Williamson County*, if indeed such procedures can be construed to make a compensation remedy *available* at all.

CHV owns and operates the Carson Harbor Village Mobile Home Park in the City of Carson (City). The City's Mobilehome Space Rent Control Ordinance (Ordinance) restricts the rent CHV may charge tenants for occupying spaces in its park. The Ordinance initially fixed rents in the park in 1979, and does not provide for automatic rent increases to account for inflation.

In June, 2000, CHV applied to the City's Mobilehome Park Rental Review Board (Rent Board) for rent adjustments sufficient to return the park to a fair rate of return, measured by the pre-rent-control return adjusted for inflation. App. A-5. In response, the Rent Board adopted a final determination approving adjustments totaling approximately six percent of those CHV had requested. *Id.* Consequently, CHV filed the present action in federal district court under 42 U.S.C. § 1983, alleging, *inter alia*, that the Rent Board had denied CHV a fair return on its investment, depriving CHV of its reasonable, investment-backed expectations and thereby infringing the Takings Clause of the Fifth Amendment. *Id.*

Because the district court was under the mistaken belief that CHV could have sought just compensation by filing an

inverse condemnation claim in state court, CHV's federal takings claim was dismissed as unripe under *Williamson County*. App. B-11-B-13.

On appeal, the Ninth Circuit affirmed the dismissal of CHV's takings claim on ripeness grounds. The appellate panel correctly recognized that inverse condemnation is no longer available to takings claimants in CHV's position. App. A-8. Instead, in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997), the California Supreme Court limited plaintiffs who allege a taking by operation of confiscatory rent regulations to a *due process* remedy of a writ of mandate, followed by a return to the Rent Board to request another rent adjustment. App. A-8-A-9. Although the Ninth Circuit correctly characterized the question of whether just compensation could ever actually be obtained via these procedures as "highly speculative," App. A-13, the appellate panel nevertheless held that scheme affords a *reasonable*, *certain*, and *adequate* means of securing just compensation, as required by *Williamson County*, 473 U.S. at 194.

CHV now petitions this Court to resolve a conflict among the circuit courts of appeals on whether *Williamson County* bars federal takings claimants from access to federal courts when the state courts have previously held that compensation is not available in such cases. Certiorari is also required to determine whether the Ninth Circuit correctly interpreted *Williamson County* as relegating federal takings claimants to state court even when the state's highest court has held that no inverse condemnation claim may be stated for Petitioner's taking. Finally, CHV petitions this Court to revisit an important constitutional question left open in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997): whether the Fifth Amendment's mandate of just compensation is satisfied by procedures that *cannot* result in the payment of compensation by the government, but conceivably might generate revenues

from private third parties to partially offset the financial impact of the taking.

REASONS WHY THE PETITION SHOULD BE GRANTED

I

THIS COURT'S *WILLIAMSON COUNTY* DECISION SHOULD NOT BE INTERPRETED TO BAR FEDERAL TAKINGS CLAIMANTS FROM ACCESS TO FEDERAL COURTS WHEN, AS IN THIS CASE, THE STATE COURTS DO NOT PROVIDE AN INVERSE CONDEMNATION REMEDY

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, this Court set out two requirements to "ripen" a regulatory takings claim for adjudication in federal court. First, the plaintiff must have received "a final decision regarding the application of the regulations to the property at issue," *id.* at 186; and second, the plaintiff must have sought "compensation through the procedures the State has provided for doing so." *Id.* at 194. But the latter, "state procedures" prong of *Williamson County* applies only when the state makes available "*reasonable*, *certain*, and *adequate*" procedures for obtaining just compensation for a taking. *Id.* (emphasis added). In *Williamson County* itself, the Court's finding that the plaintiff's takings claim was unripe rested upon the immediate availability of inverse condemnation proceedings in the Tennessee courts "under certain circumstances"—specifically including the circumstances presented by the facts of that case. *Id.* at 196-97.

In the case at bar, it is undisputed that CHV has obtained a final determination within the meaning of *Williamson County*. App. A-7. Under California law, however, CHV is barred from filing an inverse condemnation claim for just compensation. Instead, rental property owners like CHV, with a fully ripe takings claim under the first prong of *Williamson County*, are

limited to a *due process* remedy of administrative mandamus, followed (if mandamus is granted) by a return to the offending state agency to seek a *second* final determination of the same administrative application the agency has already considered and denied. Rejecting CHV's argument that resort to such measures cannot be required under *Williamson County*, the Ninth Circuit held that CHV is required to seek compensation under the procedures established by the California Supreme Court in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997). App. A-12-A-14.

In *Kavanau*, the California Supreme Court foreclosed payment of just compensation by the government as a remedy for a plaintiff in CHV's position, who alleges a regulatory taking effected by the deprivation of a fair return on rental property by the final determination of a local rent board. As acknowledged by the court below, the only remedy available under *Kavanau* is to "challenge the board's actions by applying for a writ of administrative mandate in state court," followed (if the writ is granted) by a return to the Rent Board and the re-filing of the same petition for a rent adjustment that was already denied.[1] App. A-9. Contrary to the appellate panel's interpretation, however, the *Kavanau* procedures were never intended as, nor do they provide, a means for securing just compensation for a taking.

To understand the present status of Fifth Amendment takings claims in the California courts, it is helpful to review the state's historical approach to regulatory takings law. In *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), the California Supreme Court expressly formulated a doctrine that the state's property owners had already learned: no

---

[1] Since CHV's original petition sought only to return the park to a fair rate of return—the minimum standard necessary to avoid a taking—any hypothetical second petition would necessarily seek an identical adjustment.

compensation remedy existed in that state for regulatory takings. *Id.* at 30-31. Owners whose property was confiscated by excessive regulation were limited to a *due process remedy* of invalidation of the offending statute or regulation. *Id.*

This Court directly confronted and overruled *Agins* in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Squarely rejecting the California Supreme Court's rule that takings claimants could be limited to a due process remedy, this Court stated:

> [G]overnment action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation.

First English, 482 U.S. at 315. Accordingly, the California Supreme Court doctrine espoused in *Agins* was overruled as "inconsistent[] with the requirements of the Fifth Amendment." *Id.* at 311.

However, as this Court had previously learned with *Brown v. Board of Education*, 347 U.S. 483 (1954), it is one thing to instruct the state courts on the requirements of the Constitution, but it can be quite another matter to obtain compliance with those instructions. In response to *First English*, the California Supreme Court created a stringent new procedural rule which had the effect of dramatically limiting claims for regulatory takings. Under *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994), regulatory takings claims must still proceed by way of administrative mandamus or declaratory relief. *Id.* at 1056-60. Only if a takings claimant first has the offending regulation *invalidated* via these procedures may he then seek compensation.

Obviously, mandamus is not an appropriate remedy for a taking. Indeed, such a proceeding has been expressly

recognized as inadequate for this purpose. *See First English,* 482 U.S. at 317 (disapproving as inadequate the California Supreme Court's doctrine of allowing only mandamus or declaratory relief as remedies for a taking); *Williamson County*, 473 U.S. at 197. A petition for administrative mandate seeks to invalidate the application of a regulation or ordinance as an abuse of discretion (Cal. Code of Civ. Proc. § 1094.5(b))—a result that is "universally recognized as a due process remedy." J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 261 n.285 (2003). Invalidation of the government's action is simply irrelevant to a Fifth Amendment takings claim, in which the plaintiff may readily acknowledge that the taking was accomplished through an otherwise legitimate exercise of state authority. *See* Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 Pepp. L. Rev. 99, 125 (1994):

> [It is unclear] why injured property owners should be forced to seek an invalidation remedy . . . when the legitimacy of the regulation may be conceded by the owner from the outset . . . . Until now, it had not been suggested that a writ of administrative mandamus is required to remedy permissible governmental actions.

See also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1009 (1992) (Lucas "did not take issue with the validity of the Act").

Thus, the initial response of the California Supreme Court to *First English* was to establish that regulatory takings plaintiffs must effectively pursue a due process remedy before compensation under the Fifth Amendment will even be

considered. Only three years later, in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, the state's high court went further and established that—at least where a taking is alleged through the confiscatory effects of rent regulations—the due process remedy mandated by *Hensler* altogether forecloses an inverse condemnation remedy.

In *Kavanau*, the plaintiff complied to the letter with *Hensler*'s rigorous procedural demands. His administrative mandamus petition was filed within the fleeting 90-day statute of limitations and, remarkably, Kavanau obtained a judgment from the state appellate court finding that the rent board's application of its regulations were unconstitutionally confiscatory. *Id.* at 855. Still complying with the procedures specified in *Hensler*, Kavanau then filed a timely inverse condemnation action seeking compensation for the period during which the rent board had wrongfully deprived him of a fair return. *Id.*

At this point the California Supreme Court, faced with the prospect of actually subjecting an entity of California government to the requirements of the Takings Clause, created a new doctrine by which it could avoid doing so. Having already established (in *Hensler*) that obtaining a due process remedy was a *prerequisite* to seeking just compensation for a taking, the *Kavanau* court went on to rule that the due process remedy was also, at least in this class of cases, a *substitute* for compensation. According to the court's reasoning, because Kavanau could return to the rent board and go through the petitioning process anew (to once more seek the rent increases that had previously been denied), this in itself was an adequate remedy for the taking:

> [A] remedy for [a] due process violation, if available and adequate, *obviates a finding of a taking*.

Kavanau, 941 P.2d at 865 (emphasis added).

Because every takings claimant is required, under California's procedural scheme, to obtain a due process remedy as a prerequisite to pursuing inverse condemnation, and a due process remedy obviates the finding of a taking (and therefore moots any inverse condemnation claim), the California Supreme Court has effectively foreclosed inverse condemnation as a remedy in all cases such as the one at bar. Notwithstanding this Court's pronouncement in *First English* overruling the 1979 *Agins* doctrine, the California Supreme Court has in fact *retained* the *Agins* rule: inverse condemnation is not recognized as a remedy for the sort of taking alleged in this case, as a matter of law.

Even if CHV, like Earl Kavanau, should prevail at a constitutionally inadequate mandamus hearing,[2] the *most* it could obtain would be an order compelling the Commission to set aside its final determination and open a new hearing on CHV's rent-increase petition. Cal. Code of Civ. Proc. § 1094.5(b). Just compensation from the City for its already completed violation of the Fifth Amendment would still not be available under *Kavanau*. This highlights the Ninth Circuit's erroneous belief that "inverse condemnation and section 1983

---

[2] Mandamus hearings normally review only the record compiled by the defendant agency—whose proceedings do not include such fundamental safeguards as formal evidentiary rules, the right to cross-examine witnesses, or the ability to compel attendance or testimony. Worse, this constitutionally inadequate record is reviewed under a deferential, "substantial evidence" standard, the results of which will be res judicata for purposes of any subsequent litigation. *See* Sharon L. Browne, 22 Pepp. L. Rev. at 125; *Mola Development Corp. v. City of Seal Beach*, 57 Cal. App. 4th 405, 410-411, 67 Cal. Rptr. 2d 103, 107 (Cal. 4th Dist. Ct. App. 1997) (failure to pursue mandamus hearing is res judicata, and inverse condemnation deemed waived, even though the administrative decision was reached without affording plaintiff the right to subpoena or cross-examine witnesses, and owner asserted violation of federal rights under Section 1983).

damages remedies *appear* to remain available if the mandamus/*Kavanau* adjustment remedy proves inadequate." App. A-12. Far from holding out any reasonable expectation of a subsequent inverse condemnation claim, the *Kavanau* court pointedly evaded this issue, declaring that it would not "decide what alternative remedy might be appropriate if a landlord can establish that the remedy of future rent adjustments is for some reason unavailable." 941 P.2d at 867. The California court did not even mention inverse condemnation as being among the hypothetical remedies which it "*might*" deem appropriate in a second takings action. The hypothetical availability of a remedy so speculative that it has never been described with specificity, much less awarded, cannot constitute a "reasonable, *certain*, and adequate" method for obtaining just compensation, as required by the Supreme Court in *Williamson County*.

This is why the California Supreme Court itself has never characterized the *Kavanau* procedures as a compensation remedy for a regulatory taking within the meaning of *Williamson County*. Instead, the *Kavanau* court expressly fashioned a due process remedy, which that court found would "obviate" a finding of takings liability for plaintiffs in the position of CHV. *See Kavanau*, 941 P.2d at 865. The state's high court was quite clear in ruling that an aggrieved property owner in CHV's position "***is not entitled to maintain an inverse condemnation action***." *Id.* at 854 (emphasis added). Again, a rental property owner who has been deprived of a fair return "***has not stated a viable inverse condemnation claim***." *Id.* at 867 (emphasis added). As Justice Baxter stated in dissent, the *Kavanau* majority held "***that a compensable taking cannot occur***" under the facts of that case or the case at bar. *Id.* at 872 (Baxter, J., dissenting) (emphasis added). *Accord Galland v. City of Clovis*, 16 P.3d 130, 134 (Cal. 2001) (*Kavanau* "***precluded a claim for inverse condemnation***") (emphasis added).

By limiting the remedy available to plaintiffs who assert civil rights violations under 42 U.S.C. § 1983 to a return to the very state officials charged with violating their rights, the California courts have placed themselves at odds with the fundamental purpose and function of Section 1983. As Justice Brown stated in dissent in *Galland v. City of Clovis*, 16 P.3d at 161 (Brown, J., dissenting):

> The thrust of [the Supreme Court's section 1983] decisions is that, far from relegating plaintiffs to the same corrupt system that inflicted their injury, section 1983 exists to give plaintiffs an adjudicative alternative that will ensure protection of their rights. Therefore, as the high court stated in [*Felder v. Casey*, 487 U.S. 131, 147 (1988)], "there is simply no reason to suppose that Congress . . . contemplated that those who sought to vindicate their federal rights . . . could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries."

By holding such a procedure to be an adequate means of securing compensation under *Williamson County*, the Ninth Circuit has effectively deprived California takings claimants of a forum to assert their Fifth Amendment rights. Intervention by this Court is the last hope for California property owners, who seek nothing more than an adequate forum in which to pursue their right to just compensation, as guaranteed by the Takings Clause of the Fifth Amendment.

II

THIS COURT MUST RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO WHETHER *WILLIAMSON COUNTY* REQUIRES A FEDERAL TAKINGS CLAIMANT TO SUBMIT TO ADJUDICATION BY STATE COURTS THAT HAVE HELD THAT COMPENSATION IS NOT AVAILABLE UNDER THE FACTS OF THE CASE

Notwithstanding *Williamson County*, a regulatory takings claim is ripe for federal adjudication if the state courts have consistently denied compensation for claims of the same type. Such a situation is uniformly regarded as confirmation that the state's procedures for securing just compensation are *inadequate*, within the meaning of *Williamson County*.

> The difficult question is when the inadequacy exception should apply. Several courts have indicated that it is relevant where there is a high degree of certainty that state courts will refuse to award just compensation *and that it definitely applies where the takings claim is on all fours with previous state decisions that deny compensation.* A logical generalization from these decisions is that the exception should at least apply where the claimant shows, through an analysis of state law and judicial outcomes, that a resort to state procedures is highly likely to be futile; i.e., where courts construct takings law to virtually foreclose vindication of a particular takings claim and where it is empirically clear that the state process rarely, if ever, results in an award of damages.

J. David Breemer, 18 J. Land Use & Envtl. L. at 258-59 (emphasis added; footnotes deleted). *See also* Thomas E. Roberts, *Fifth Amendment Takings Claims in Federal Court:*

The State Compensation Requirement and Principles of Res Judicata, 24 Urb. Law. 479, 497 (1992) (if state courts have already denied compensation for same type of claim, the case is ripe for federal adjudication).

This interpretation of *Williamson County* is settled law in the courts of the Fourth Circuit. *See Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068, 1072-73 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994) (holding a Fifth Amendment takings challenge was ripe for federal adjudication because the state courts had already rejected compensation in identical circumstances). The Fifth Circuit applies the same rule. In *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991), that court of appeals found *Williamson County* to carry an implication that "the mere existence of some compensation mechanism does not necessarily render those procedures adequate." *Id.* at 934. The *Samaad* court went on to survey cases establishing that "'inadequate' procedures are those that *almost certainly* will not justly compensate the claimant." *See also Rolf v. City of San Antonio*, 77 F.3d 823, 826 (5th Cir. 1996) (state procedures under *Williamson County* "are inadequate when they '*almost certainly* will not justly compensate the claimant'") (quoting *Samaad*, 940 F.2d at 934). The Seventh Circuit came to the same conclusion in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) (a takings claim is ripe for federal adjudication when "it is apparent that the state does not intend to pay compensation"); as did the Eleventh Circuit in *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516-17 (11th Cir. 1987) (holding a takings claim arising from application of zoning was ripe for federal adjudication because the Florida Supreme Court did not recognize a compensation claim for confiscatory zoning).

In California, no published decision of the state courts has ever awarded or upheld an award of just compensation for a

taking that did not entail a physical invasion or occupation of property. More specifically, the state courts have repeatedly and uniformly denied compensation in cases arising from the same legal and factual milieu as the case at bar, involving takings challenges triggered by the confiscatory impact of mobile home rent control ordinances. *See, e.g., Yee v. Mobilehome Park Rental Review Board*, 62 Cal. App. 4th 1409, 73 Cal. Rptr. 2d 227, 235-37 (Cal. 4th Dist. Ct. App.1998) (describing park owner's Fifth Amendment takings suit as "an often rejected claim," and denying compensation on ground that availability of a due process remedy "is a valuable benefit that satisfies the takings clause"); *Montclair Parkowners Association v. City of Montclair*, 76 Cal. App. 4th 784, 90 Cal. Rptr. 2d 598, 603-05 (Cal. 4th Dist. Ct. App. 1999) (denying takings claim and expressly rejecting *federal* precedent that would have mandated award of compensation). Given California's unequivocal record of rejecting compensation claims on all fours with the one at bar, CHV's claim would have been deemed ripe for adjudication in federal court under the precedent of the Fourth, Fifth, Seventh, or Eleventh Circuit. By denying Petitioner's access to federal court despite California's clear rejection of substantially identical takings claims, the Ninth Circuit has created a conflict that can only be resolved by this Court.

The Ninth Circuit has left CHV no alternative but to litigate before a state judiciary that has already ruled that compensation is not available for claims of this type, and does not even offer an inverse condemnation remedy—in the guise of "ripening" its federal Fifth Amendment takings claim. This absurd result cannot be what this Court intended in *Williamson County*. Nevertheless, unless certiorari is granted for purposes of ordering the Ninth Circuit to exercise its rightful jurisdiction, property owners like CHV will continue to suffer deprivations of rights supposedly guaranteed under the United States Constitution, yet be denied the opportunity to defend those

rights in federal court. Worse, the availability of a federal forum to address violations of the Fifth Amendment will depend entirely on the circuit in which the alleged violation occurs.

III

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION LEFT UNANSWERED IN *SUITUM V. TAHOE REGIONAL PLANNING AGENCY*—WHETHER THE FIFTH AMENDMENT'S MANDATE OF JUST COMPENSATION CAN BE SATISFIED BY PROCEDURES THAT HOLD OUT THE PROSPECT OF RECOVERY *NOT* FROM THE GOVERNMENT, BUT FROM THIRD PARTIES WHO BEAR NO RESPONSIBILITY FOR THE TAKING

In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, this Court vacated a Ninth Circuit decision that implicated important issues raised by the case at bar. In *Suitum*, the defendant agency had allegedly deprived the plaintiff of all economically viable use of her land, but the Ninth Circuit found the takings claim was not ripe under *Williamson County*. *Id.* at 733. The court of appeals held that Suitum's claim could not be litigated until she attempted to utilize the agency's "transfer of development rights" program—a scheme that held out the (untested) possibility that Suitum could receive payments from third-party property owners in the region, thereby offsetting the financial impact of the regulations. *Id.*

Because the Ninth Circuit had found Suitum's claim unripe under *Williamson County's first* prong, this Court expressly declined to decide whether such third-party offsets could qualify as an adequate means of providing just compensation within the meaning of *Williamson County's second* prong. *Id.* at 728. However, Justice Scalia's concurrence, joined by Justices O'Connor and Thomas, drew attention to "[t]he cleverness of the scheme" the agency had

devised, which "causes the payment to come, not from the government, *but from third parties*." *Id.* at 748 (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original).

In the present case, as in *Suitum*, the Ninth Circuit has found a takings claim unripe because CHV has not pursued similarly untested procedures which could never result in the payment of compensation by the government, but nevertheless *might* generate offsetting revenues from third parties via higher future rents. Although CHV is barred from pursuing compensation via inverse condemnation, the California courts hold out the tenuous prospect that *if* CHV can prevail at a constitutionally inadequate mandamus hearing and have the Rent Board's determination invalidated, and *if* CHV can then succeed in prevailing upon the same Rent Board to grant adjustments to offset the damages created by its prior unconstitutional actions, *then* CHV can attempt to impose those adjustments on future tenants—who may be a completely different population from those who benefitted from the Rent Board's past infractions, and who may or may not be willing and able to pay amounts sufficient to offset CHV's losses. The troubling aspects of regarding such a remedy as satisfying the Fifth Amendment's mandate of just compensation were highlighted by Judge O'Scannlain in his special concurrence below.

The Fifth Amendment requires that private property not be taken for public use "without payment of just compensation." Since the sole function of the Constitution is to constrain government action, it would have been redundant to insert the words "by the government" at the end of the clause. That the government may not evade the compensation requirement by dragooning innocent third parties and forcing them to pay its debts should be implicit in our understanding of the Constitution and its function. Yet as Judge O'Scannlain noted below, under California's *Kavanau* procedures, even if a

property owner should succeed in obtaining the remedy the state holds out, "the burden of compensation falls not on the government as the representative of the benefitting general public, but on a select group of future tenants." App. A-14. Judge O'Scannlain continues:

> [T]he clear import . . . of the language of the Fifth Amendment itself, is that those whose property has been taken for public use must be compensated by the general public through the government. The Fifth Amendment is therefore violated when government attempts to lay the general public's burden of just compensation on third parties.

Id. A-15. Not only has the Supreme Court "invariably operated under the assumption that the *government* is the entity charged with paying just compensation," *id.*, this assumption also permeates lower court opinions and the legal literature on Fifth Amendment takings. *See, e.g.*, *United States v. Dickinson*, 152 F.2d 865, 868 (4th Cir. 1946) ("compensation must be paid ***by the government*** under the rules established by the decisions") (citing to six decisions of the Supreme Court; emphasis added); Kenneth Salzberg, *"Takings" as Due Process, or Due Process as "Takings"?*, 36 Val. U. L. Rev. 413, 420 n.42 (2002) ("plain meaning of the Takings Clause . . . provides that just compensation must be paid ***by the government*** to the affected property owner") (emphasis added)).

Judge O'Scannlain's conclusion, that a plaintiff must actually utilize California's *Kavanau* procedures before complaining that they are constitutionally inadequate, sets uneasily with his recognition that these procedures could *never* result in an award of just compensation from the City. App. A-16. Whether such procedures can be deemed adequate within the meaning of *Williamson County* requires resolution of the question this Court left unresolved in *Suitum*: whether the Fifth Amendment requires just compensation to be paid by the

government agency responsible for the taking, or whether that liability can be passed on to private third parties who bear no responsibility for the government's confiscatory actions.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: July, 2004.

Respectfully submitted,

DAVID SPANGENBERG
Of Counsel
Law Office of David Spangenberg
420 Hudson Street, Suite A
Healdsburg, California 95448
Telephone: (707) 473-4340
Facsimile: (707) 473-0656

R.S. RADFORD
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

INDEX

Appendix A	Opinion of the Ninth Circuit Court of Appeals, filed January 2, 2004.
Appendix B	Order of the United States District Court for the Central District of California, filed June 11, 2002.
Appendix C	Order of the Ninth Circuit Court of Appeals, filed March 22, 2004.
Appendix D	City of Carson's Mobilehome Space Rent Control Ordinance.

Appendix A-1

No. 02-56213

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

CARSON HARBOR VILLAGE, LTD., a Limited Partnership dba Carson HarborVillage Mobile Home Park,	)	Argued and Submitted June 3, 2003
Plaintiff-Appellant,	)	Filed
v.	)	Jan. 2, 2004
CITY OF CARSON, a Municipal Corporation; Carson City Mobilehome Park Rental Review, Board,	)	
Defendants-Appellees,	)	
and	)	
Carson Harbor Village Mobilehome Park Homeowners Association, Real Party in Interest,	)	
Defendant.	)	

* * * *

Background: Owner of mobile home park brought suit under § 1983 against city and city rental review board alleging that mobile home rent control laws violated of the Takings Clause of the Fifth Amendment. The United States District Court for the Central District of California, Robert J. Kelleher, J., dismissed the claims as unripe and owner appealed.

Holding: The Court of Appeals, Fisher, Circuit Judge, held that claim was not ripe for adjudication in federal court.

Affirmed.

O'Scannlain, Circuit Judge, concurred specially and filed opinion.

David Spangenberg, Healdsburg, California, for the plaintiff-appellant.

Rochelle Browne, Peter M. Thorson, Richards Watson & Gershon, Los Angeles, California, for the defendants-appellees City of Carson and City of Carson Mobilehome Park Rental Review Board.

Appeal from the United States District Court for the Central District of California, Robert J. Kelleher, District Judge, Presiding. D.C. No. CV-01- 04799-RJK.

Before: REINHARDT, O'SCANNLAIN and FISHER, Circuit Judges.

FISHER, Circuit Judge.

"We are called upon to consider, yet again, a takings challenge to mobile home rent control laws." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 683 (9th Cir.1993). Carson Harbor Village, Ltd. ("Carson Harbor") is a large mobile home park located in the City of Carson ("City"). This case arises out of the City's handling of Carson Harbor's June 2000 and April 2001 applications for rent increases. In June 2000, Carson Harbor applied for monthly rent increases ranging from approximately $223 to $241 per mobile home space, but the City's Mobilehome Park Rental Review Board ("Board")

approved an increase of only $14.29 per space.[1] Thereafter, Carson Harbor sued in federal district court under 42 U.S.C. § 1983 claiming a violation of the Fifth Amendment's Takings Clause. The district court dismissed Carson Harbor's regulatory takings claims as unripe under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Carson Harbor now appeals.[2]

We agree that this regulatory takings claim is unripe. Carson Harbor has failed to avail itself of state procedures for seeking just compensation, as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), and has failed to show that these procedures are inadequate.

---

[1] In April 2001, Carson Harbor filed an application for $295,657 in regulatory lag rents, attorney's fees and costs incurred in obtaining the $14.29 rent increase, but the City allegedly refused to process the application.

[2] As a preliminary matter, we will not consider Carson Harbor's second regulatory takings claim, challenging the City's alleged refusal to process the April 2001 regulatory lag rent application. Carson Harbor does not address the dismissal of this claim in its appellate brief and has therefore waived this issue on appeal. *See Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 511 (9th Cir.2002); *Ceja v. Stewart*, 97 F.3d 1246, 1252 (9th Cir.1996). Therefore, the only claim we address in this opinion is Carson Harbor's regulatory takings claim challenging the Board's partial denial of Carson Harbor's June 2000 rent increase application.

In addition to the regulatory takings claims, Carson Harbor also brought substantive due process, procedural due process and equal protection claims challenging the City's handling of the June 2000 and April 2001 rent increase applications. We address these claims in a separate memorandum disposition filed contemporaneously with this opinion.

Accordingly, we affirm the district court's dismissal of Carson Harbor's regulatory takings claim.

FACTUAL AND PROCEDURAL BACKGROUND[3]

Carson Harbor is a 420 space, 70 acre mobile home park located in the City of Carson, California and accounts for approximately 17 percent of the City's mobile home rental housing. In 1979, the City enacted the Mobilehome Space Rent Control Ordinance ("Ordinance"), which places a ceiling on rent levels for mobile home spaces. *See* Carson Municipal Code ("CMC"), Art. IV, Ch. 7, §§ 4700 *et seq*. The purpose of the Ordinance was to prevent mobile home park owners from exploiting a perceived shortage in mobile home spaces by charging high rents. When the Ordinance was enacted, Carson Harbor was newly opened and was offering below-market rents in an effort to attract tenants. The Ordinance froze those below-market rents in place and required Carson Harbor to secure the Board's approval before instituting any rent increases.

The Ordinance does not provide for automatic rent increases for inflation or changed circumstances such as increased costs of operation or capital investments. Instead, a mobile home park owner seeking a rent adjustment above the ceiling must submit a rent increase application to the Board. CMC §§ 4703, 4704. The Board must then hold a public hearing, at which the mobile home park owner, affected residents and other interested persons may offer testimony. *Id.*

---

[3] This factual background is based on the complaint. Because this case was dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the facts alleged in the complaint must be accepted as true. *Winn v. Killian*, 307 F.3d 1011, 1014 n. 1 (9th Cir.2002).

§ 4704(e)(f). After a hearing on a proposed rent increase, the Board "may approve the rent increase requested, approve a modified rent increase or deny the application pursuant to the standards established by subsection[ ](g)[ ] of this Section." *Id.* § 4704(f)(3). Subsection (g) in turn provides that the Board "shall grant such rent increases as it determines to be fair, just and reasonable. A rent increase is fair, just and reasonable if it protects Homeowners from excessive rent increases and allows a fair return on investment to the Park Owner." *Id.* § 4704(g). The Board must consider 11 enumerated but nonexclusive factors when making its determination. *Id.* These include changes in the Consumer Price Index, capital improvements to mobile home spaces and changes in reasonable operating and maintenance expenses. *Id.*

This case arises out of the City's handling of Carson Harbor's June 2000 application for a rent increase. On June 28, 2000, Carson Harbor applied for monthly rent increases ranging from $222.65 to $240.73 for 407 of its 420 mobile home spaces. Carson Harbor claims that it sought the increases "so that the fair rate of return in 1999 would equal the fair rate of return at the inception of rent control in constant dollars." The Board held a hearing on the proposed increases on February 29, 2001, and subsequently approved a monthly rent increase of only $14.29 per space. Carson Harbor alleges that the Board "arbitrarily excluded hundreds of thousands of dollars in legitimately incurred operating expenses" in determining the size of the rent increase and that the Ordinance, "as applied, totally destroyed Plaintiff's reasonable investment-backed expectations."

On May 29, 2001, Carson Harbor filed a complaint in federal district court under 42 U.S.C. § 1983 alleging that the Board's partial denial of its June 2000 rent increase application constituted a regulatory taking of property in violation of the Fifth Amendment's Taking Clause, made applicable to the

states through the Fourteenth Amendment. The defendants subsequently moved to dismiss Carson Harbor's regulatory takings claim for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The district court granted the motion, holding that Carson Harbor's regulatory takings claim was unripe because Carson Harbor had failed to pursue state remedies for just compensation as required by *Williamson*.

STANDARD OF REVIEW

We review de novo a district court's dismissal of a complaint for lack of subject matter jurisdiction under *Rule 12(b)(1). Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir.2000). In reviewing the Rule 12(b)(1) dismissal, we must accept all factual allegations in the complaint as true. *Id*.

DISCUSSION

Under *Williamson*, an as-applied takings claim is ripe only if the plaintiff can establish that (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the claimant has sought "compensation through the procedures the State has provided for doing so." 473 U.S. at 186, 194, 105 S.Ct. 3108; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997). The first ripeness requirement embodies "the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). As a general rule, until the landowner has "followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering [whether

to grant the landowner's request], including the opportunity to grant any variances or waivers allowed by law[,] . . . the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Id.* at 620-21, 121 S.Ct. 2448. "The second [ripeness requirement] stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment; 'if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.'" *Suitum*, 520 U.S. at 734, 117 S.Ct. 1659 (quoting Williamson, 473 U.S. at 195, 105 S.Ct. 3108).

We think it beyond question—and the City does not dispute—that Carson Harbor's regulatory takings claim satisfies the first (finality) prong of the *Williamson* ripeness test. Carson Harbor made a meaningful application for a variance from the rent control law by submitting an application for a rent increase in June 2000, which the Board partially granted and partially denied on February 28, 2001. *See Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 475(9th Cir.1994) (holding than an earlier regulatory takings claim satisfied the first prong of *Williamson* because Carson Harbor had applied for a rent increase, which was partially granted and partially denied), *overruled in part on other grounds by WMX Techs. v. Miller*, 104 F.3d 1133, 1136 (9th Cir.1997) (en banc); *see also Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.1994).

The disputed question on appeal is whether Carson Harbor has satisfied the second (exhaustion) prong of *Williamson.* Carson Harbor admits that it has failed to seek state remedies for the alleged taking, but argues that it is not required to do so because those remedies are inadequate. *Williamson* itself held that a plaintiff may be excused from exhausting state remedies if the plaintiff demonstrates that the remedies are "unavailable

or inadequate." 473 U.S. at 197, 105 S.Ct. 3108; *see also Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 851 (9th Cir.2001) (en banc), *aff'd by Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003). "A landowner who seeks to sue in federal court before seeking compensation from the state 'bears the burden of establishing that state remedies are inadequate.'" *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506-07 (9th Cir.1990) (quoting *Austin v. City & County of Honolulu*, 840 F.2d 678, 680 (9th Cir.1988)). "A landowner fails to discharge this burden by showing that state procedures are untested or uncertain." *Id.* at 1507; *see also Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir.1988); *Austin*, 840 F.2d at 681.

The question, then, is whether Carson Harbor has shown that California's procedures for seeking just compensation are inadequate. Until the California Supreme Court decided *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761, 66 Cal.Rptr.2d 672, 941 P.2d 851 (1997), the state procedure for obtaining just compensation for a takings claim was to bring an inverse condemnation action in state court. If that had remained the procedure when the taking allegedly occurred in this case, there would be no question that California's compensation remedies were adequate and that Carson Harbor's takings claim would be unripe. We have "expressly held that, post 1987, California's inverse condemnation procedures are adequate to address a regulatory takings claim." *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir.1998) (citing *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir.1993); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 (9th Cir.1991)).

Kavanau and, subsequently, *Galland v. City of Clovis*, 24 Cal.4th 1003, 103 Cal.Rptr.2d 711, 16 P.3d 130 (2001), however, have modified California's procedure for seeking just

compensation in a takings case. In *Kavanau*, the court held that "a landlord may not obtain inverse condemnation damages against a government agency for temporarily imposing rent ceilings . . . so as long as the landlord was able to obtain an adequate adjustment of prospective rents that would compensate for past losses." *Galland*, 103 Cal.Rptr.2d 711, 16 P.3d at 143 (interpreting *Kavanau*); *see Kavanau*, 66 Cal.Rptr.2d 672, 941 P.2d at 854 ("[W]e conclude Kavanau is not entitled to maintain an inverse condemnation action, because he may obtain a full and adequate remedy for any interim loss flowing from the due process violation through an adjustment of future rents under the rent regulation process."). Before an owner of rental property can bring a state inverse condemnation proceeding against a rental review board, the owner must first challenge the board's actions by applying for a writ of administrative mandate in state court. *See Galland*, 103 Cal.Rptr.2d 711, 16 P.3d at 143. Once the writ has been granted, the property owner must then seek an adjustment of future rents from the rental review board. Such an adjustment is also referred to as a "*Kavanau* adjustment." *See id.* at 145.

In *Galland*, the court considered the further question whether a property owner could seek section 1983 damages in state court for a violation of substantive due process *before* seeking a writ of mandate and a *Kavanau* adjustment. The court answered this question in the negative: "[W]hen landlords seek section 1983 damages from allegedly confiscatory rent regulation, we hold that they must show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate." *Id.* at 145. Under *Kavanau* and *Galland*, then, it appears that a landowner must seek a writ of mandate and *Kavanau* adjustment before bringing an inverse condemnation or section 1983 action in state court. *Kavanau*

and *Galland* thus mark a significant change in California's state law remedies for excessive rent control.[4]

---

[4] The district court and the defendants try to distinguish *Kavanau* on the ground that the *Kavanau* court did not reach the question whether a taking had occurred. That distinction misses the point. The *Kavanau* court concluded that there was no need to decide whether the rent regulation constituted a taking, because even if it did, the mandamus/*Kavanau* adjustment process provided an adequate remedy. *Kavanau*, 66 Cal.Rptr.2d 672, 941 P.2d at 865. The district court and the defendants also try to distinguish *Galland* on the ground that it dealt with a substantive due process challenge, not a takings challenge. This, too, is an irrelevant distinction because the *Galland* court expressly recognized takings and substantive due process claims as interchangeable:

> To be sure, *Kavanau* involved a takings claim, and this case is concerned with what is labeled substantive due process. But we have recognized that a price regulation that causes confiscation may be designated interchangeably as either a taking of property under the Fifth and Fourteenth Amendments of the United States Constitution or a violation of due process. It would be incongruous for us to conclude, on the one hand, as we did in *Kavanau*, that a landlord permitted adequate rent adjustments had not suffered a constitutional injury under the takings clause, but, on the other hand, that he or she has suffered such an injury under the due process clause.

Galland, 103 Cal.Rptr.2d 711, 16 P.3d at 144 (citations omitted). We do not here consider the accuracy of the court's characterization of federal law. As a matter of state law, however, the court's treatment of takings and substantive due process claims as interchangeable indicates that regardless of which claim the property owner asserts, the landlord must first pursue the mandamus/*Kavanau* process before bringing an

(continued...)

Carson Harbor argues that *Kavanau* and *Galland* have rendered California's compensation scheme inadequate. In *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, No. 02-15986, 2003 WL 22961340 (9th Cir. Dec.17, 2003), we recently concluded that the mobile home park owner failed to show that California's state remedies are inadequate. *Id.* at 659, 2003 WL 22961340 at *6. Carson Harbor contends, however, that *Kavanau* and *Galland* have effectively deprived rent-controlled property owners of the ability to bring inverse condemnation or section 1983 damages actions, which places them in the very position the Supreme Court declared unconstitutional in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Before *First English* was decided, a landowner could not maintain an inverse condemnation proceeding in California state court based on a regulatory taking. *See Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25, 29- 31 (1979), *aff'd on other grounds*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Under *Agins*, the landowner's sole remedy was to bring an action for a writ of mandate. Even if the writ were granted, the landowner could not receive compensation for damages incurred before issuance of the writ; rather, the landowner could only receive compensation for damages incurred after the writ was issued, if the government persisted in enforcing the invalidated regulation. In *First English*, the United States Supreme Court abrogated the *Agins* rule, holding that California's writ of mandate was an inadequate remedy for a regulatory taking of property. 482 U.S. at 321, 107 S.Ct. 2378. Carson Harbor argues that *Kavanau* and *Galland* have in effect restored the *Agins* rule, and that *First English* therefore requires us to declare California's compensation scheme inadequate.

---

[4] (...continued)
inverse condemnation action or section 1983 action for damages in state court.

We do not read *Kavanau* and *Galland* as reinstating the *Agins* rule. First, the mandamus/*Kavanau* adjustment remedy does—at least in principle—allow a landowner to recover for damages incurred prior to issuance of the writ of mandate: the *Kavanau* adjustment is supposed to compensate for past losses. Second, inverse condemnation and section 1983 damages remedies appear to remain available if the mandamus/*Kavanau* adjustment remedy proves inadequate. In *Kavanau*, the court stated that it did not need to:

> decide what alternative remedy might be appropriate if a landlord can establish that the remedy of future rent adjustments is for some reason unavailable. But before *Kavanau* can allege the unavailability of future rent adjustments, he must petition for those adjustments, the Rent Board must determine, subject to judicial review, their appropriate amount, and he must attempt to impose them.

66 Cal.Rptr.2d 672, 941 P.2d at 867.

In *Galland*, the court went further and held that a landlord can seek section 1983 damages if he can "show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate." 103 Cal.Rptr.2d 711, 16 P.3d at 145.

Carson Harbor further contends that a writ of mandate and *Kavanau* adjustment will not provide adequate compensation because the superior court issuing the writ must remand the case to the municipal rental review board to determine the increase in future rents necessary to compensate the plaintiff for past losses. *See Kavanau*, 66 Cal.Rptr.2d 672, 941 P.2d at 866. According to Carson Harbor, the rental review board is unlikely to grant an adequate rent increase because it was unwilling to

grant an adequate rent increase in the first place, and consequently California's new compensation scheme will "result in a string of writ of mandate challenges, and a string of remand hearings, the costs of litigation ever increasing, until one party or another, the city or the park owner, gives up in exhaustion."

We acknowledge that Carson Harbor raises serious concerns about the adequacy of the new compensation procedures established in *Kavanau* and *Galland*. Nevertheless, the alleged inadequacy of the procedures remains highly speculative. Carson Harbor has not sought a writ of mandate and *Kavanau* adjustment, nor has Carson Harbor identified any landowner who has sought and failed to receive adequate compensation through these procedures. At best, Carson Harbor has merely alleged that the new compensation procedures are "untested or uncertain." *Del Monte Dunes*, 920 F.2d at 1507. Under our precedents, that is not enough to qualify for an exemption from *Williamson*'s second ripeness requirement. *Id.* It may turn out that the mandamus/ *Kavanau* process proves to be futile. We will not, however, assume the accuracy of this prediction. *See Hacienda Valley*, 353 F.3d at 659, 2003 WL 22961340, at *6.[5] Accordingly, we affirm the

---

[5] Carson Harbor also claims that the mandamus/*Kavanau* adjustment remedy is inadequate because it requires the landlord to recover compensation from tenants rather than from the municipality. According to Carson Harbor, the "tenants may have moved, died or simply be unable to afford increases intended to make up for the government's past confiscatory rates." Regardless of the merits of this argument, it is also speculative at this stage and thus not ripe for decision. Carson Harbor has not shown that it would be precluded from obtaining damages from the municipality in the event that the mandamus/*Kavanau* adjustment remedy does prove to be

(continued...)

dismissal of Carson Harbor's regulatory takings claim as unripe.[6]

AFFIRMED.

O'SCANNLAIN, Circuit Judge, concurring specially.

Because Carson Harbor has made no effort to seek compensation for an alleged taking through a writ of mandamus and *Kavanau* adjustment, I agree that its regulatory takings claim must be dismissed as unripe. Any analysis of the California procedures in this case would necessarily be speculative. But I write separately to express my concern that California's procedures may not provide "just compensation" because the burden of compensation falls not on the government as the representative of the benefitting general public, but on a select group of future tenants.

The Supreme Court has repeatedly explained the central purpose of the Takings Clause: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 618-19, 121 S.Ct. 2448, 150 L.Ed.2d 592

---

[5] (...continued)
inadequate. *See Kavanau*, 66 Cal.Rptr.2d 672, 941 P.2d at 867; *Galland*, 103 Cal.Rptr.2d 711, 16 P.3d at 145.

[6] Because we affirm the dismissal of Carson Harbor's regulatory takings claim on ripeness grounds, we need not address the City's alternative argument that res judicata also justifies the dismissal.

(2001) (citing *Armstrong* to illustrate "the purpose of the Takings Clause"); *Eastern Enters. v. Apfel*, 524 U.S. 498, 522, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (plurality op.) (citing *Armstrong* as expressing "the aim of the [Just Compensation] Clause"); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (citing *Armstrong* for "[t]his basic understanding of the [Fifth] Amendment"); *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (citing *Armstrong* in discussing the "factors that have shaped the jurisprudence of the Fifth Amendment"). The clear import of this central principle of takings law, and of the language of the Fifth Amendment itself, is that those whose property has been taken for public use must be compensated by the general public through the government. The Fifth Amendment is therefore violated when government attempts to lay the general public's burden of just compensation on third parties.

Although the Court has wrestled with many issues in its extensive takings jurisprudence—most notably, the intricate question of regulatory takings—it has invariably operated under the assumption that the government is the entity charged with paying just compensation. *See, e.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed.2d 517 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner[.]") (citation omitted); *First English*, 482 U.S. at 319, 107 S. Ct. 2378 ("Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period."); *id.* at 321, 107 S. Ct. 2378 ([N]o subsequent action by the government can relieve it of the duty to provide compensation for the period during which the

taking was effective."); *Kaiser Aetna v. United States*, 444 U.S. 164, 180, 100 S. Ct. 383, 62 L. Ed.2d 332 (1979) ("And even if the Government physically invades only an easement in property, it must nonetheless pay compensation."). Together, these cases stand for a clear proposition: once the government executes a taking, the Constitution does not permit it to shift the public's burden of just compensation to third parties. When property is taken for public use under the Fifth Amendment, the public—and not specific individuals or groups at the order of the government—must pay.

If Carson Harbor were to establish that it had suffered a regulatory taking, a *Kavanau* adjustment would provide that future renters alone compensate Carson Harbor in the form of increased rents. Thus, future tenants—some of whom may not have even received the benefit of the earlier confiscatory rates—would be forced to pay for the rental review board's taking of property for public use. I seriously doubt that such outcome would amount to the "just compensation" demanded by the Fifth Amendment, for it violates the principle that compensation must be just both to the deprived property owner and the taking public. *See United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S. Ct. 547, 94 L. Ed. 707 (1950) ("[T]he dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to *the public that must pay the bill*?") (emphasis added).

Because California's recently altered procedures were not tested in this case, however, consideration of such a weighty but hitherto unexplored issue must be deferred to another occasion, when it is squarely presented for our review.

Appendix B-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 01-4799 RJK

CARSON HARBOR VILLAGE, LTD., a California Limited Partnership dba Carson Harbor Village Mobilehome Park, Plaintiff v. CITY OF CARSON, a municipal corporation; THE CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD, Defendants.	ORDER RE DEFENDANTS' MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE OR IN THE ALTERNATIVE FOR ABSTENTION Filed June 11, 2002 Entered June 12, 2002

After the hearing on January 14, 2002, the Court took under submission the Motion to Dismiss Complaint Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure or in the Alternative, for Abstention filed by Defendants City of Carson (the "City") and City of Carson Mobilehome Park Rental Review Board (the "Board") (collectively, "Defendants"). After considering the papers filed by the parties, the case file and argument of counsel, the Court GRANTS the motion to dismiss.

Appendix B-2

I. BACKGROUND

This dispute concerns the application of the City's rent control laws to a mobilehome park. Plaintiff Carson Harbor Village, Ltd. owns a 420-space, 70-acre resort-style mobilehome park (the "Park") in the City. (Compl., ¶ 9.) The Park represents approximately 17 percent of the total mobilehome rental housing in the City. (Id., ¶ 11.)

Pursuant to the City's Mobilehome Space Rent Control Ordinance (the "Ordinance") and related guidelines, mobilehome park spaces are subject to a ceiling on rent levels. (See id., ¶¶ 12, 54, 55.) The Ordinance does not provide for automatic rent increases for changed circumstance such as increased costs of operation. (Id., ¶ 12.) Nor does the Ordinance provide for an automatic rent increase to account for inflation. (Id.) Instead, a property owner seeking a rent adjustment above the ceiling must submit a rent increase application to the Board. (Id., ¶ 14.)[1] The Ordinance requires the Board to consider a list of eleven enumerated but non-exclusive factors when reviewing rent increase applications and grant "'such rent increase as it determines to be just, fair and reasonable.'" (Id., ¶ 57.) Those factors include changes in the Consumer Price Index, the rent lawfully charged for comparable mobilehome spaces in the City, length of time since the last rent increase, relevant capital improvements, changes in property taxes, and changes in reasonable operating expenses. (See Defendants' Req. for Judicial Notice, Ex. A [the Ordinance], § 4704(g).)

The parties here have a long and tortuous history. Over the past twenty years, the parties have litigated both the facial constitutionality of the Ordinance and various as-applied

---

[1] The Board members are appointed by the elected members of the City Council. (Id., ¶ 10.)

challenges raised by Plaintiff in state and federal courts. See, e.g., Carson Mobilehome Park Owner's Ass'n v. City of Carson, 35 Cal.3d 184 (1983); Carson Harbor Village v. City of Carson, 37 F.3d 468 (9th Cir. 1994); August 1, 2000 Order Granting Defendants' Motion for Judgment on the Pleadings in Carson Harbor Village Mobilehome Park v. City of Carson, Case No. 99-12530-DDP (C.D. Cal.).[2] All of those lawsuits have resulted in final judgments adverse to Plaintiff.

The claims in this case arise out of Defendants' treatment of Plaintiff's applications for rent increases submitted in June 2000 and April 2001. In June 2000, Plaintiff filed an application seeking rent increases ranging from $222.65 to $240.73 per month for 407 of the 420 spaces in the Park. (Defendants' Req. for Judicial Notice, Ex. L at 1.). The application is based on the Park's 1999 operating expenses and income. (Id. at 3; see Compl., ¶ 17.) Plaintiff alleges that it sought the increase "so that the fair rate of return in 1999 would equal the fair rate of return at the inception of rent control in constant dollars." (Compl., ¶ 17.) After a hearing on February 29, 2001, the Board granted, in part, Plaintiff's application (the "February 2001 decision"). (Id., ¶¶ 19-20.) The Board approved a $14.29 per space per month rent increase. (See id., ¶¶ 20-21.)

Plaintiff alleges that the Board misinterpreted, misapplied and otherwise failed to follow the Ordinance in approving only a $14.29 increase per space. (Id., ¶¶ 20, 51.) Plaintiff asserts that the Board's improper application disallowed hundreds of thousands of dollars of the Park's legitimately incurred operating expenses. (Id.) As a result, Plaintiff alleges, the Board inflated Plaintiff's 1999 net operating income, the net

---

[2] Pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of these orders and all other documents attached to Defendants' Request for Judicial Notice filed on July 25, 2001.

effect of which "is that Plaintiff's fair rate of return in constant dollars is materially and substantially below the fair rate of return at the inception of [the] Ordinance." (Id., ¶¶ 20, 21.) Thus, Plaintiff claims that the Ordinance, "as applied, totally destroyed Plaintiff's reasonable investment-backed expectations." (Id.)

In April, 2001, Plaintiff submitted a second application seeking a rent increase (or surcharge) to address the "regulatory lag" in obtaining the $14.29 rent increase. (Id. at ¶ 23.) Due to state law notice requirements, Plaintiffs could not impose the $14.29 rent increase until June 1, 2001. (Id.) Plaintiff claims that it is entitled to receive, at a minimum, "the City-determined fair rate of return from the date the City determined Plaintiff was entitled to it in January 1999 through June 1, 2001." (Id.) Specifically, the April 2001 application sought $295,657.01 in regulatory lag rents, attorney's fees and costs incurred in obtaining the City's approval of the rent increase. (Id.) Plaintiff alleges that the City Attorney, operating on behalf of the City, improperly refused to process this application. (Id.)

On May 29, 2001, Plaintiff filed a complaint asserting eight counts.[3] The federal counts are: (1) deprivation of Plaintiff's constitutional rights in violation of 42 U.S.C. § 1983; (2) as-applied regulatory taking of property by way of the February 2001 decision; (3) as-applied substantive due process violation by way of the February 2001 decision; (4) as-applied procedural due process violation by way of the February 2001 decision; (5) as-applied procedural due process violation by way of the City's refusal to process and hear the April 2001 application; (6) as-applied regulatory taking by way of the City's refusal to process and hear the April 2001 application;

---

[3] The complaint uses the word "count" in lieu of "claim." The Court shall use "count" and "claim" interchangeably.

and (7) as-applied equal protection violation by way of the February 2001 decision. Plaintiff's single state count seeks a writ of administrative mandamus pursuant to California Code of Civil Procedure section 1094.5.

On July 25, 2001, Defendants filed their motion to dismiss for lack of subject matter jurisdiction or failure to state a claim. In the alternative, Defendants move for abstention. Plaintiff filed an opposition on October 5, 2001, and Defendants filed their reply on October 22, 2001. Defendants' motion was heard on January 14, 2002.

II. DISCUSSION

A. Applicable Legal Standards

1. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A motion to dismiss pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) for lack of subject matter jurisdiction must be considered before other challenges because the federal court must find jurisdiction before considering the merits of the case. 2 James Wm. Moore, et al., Moore's Federal Practice § 12.30[1]. The burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. See Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995).

A Rule 12(b)(1) motion may be used to challenge two different types of defects: defects in pleading (or "facial attacks") and defects in fact. Moore's Federal Practice § 12.30[4]. When reviewing a facial attack, the Court accepts the allegations in the complaint as true and examines only whether the allegations are sufficient to show that the federal court has jurisdiction over the matter of the case. See id. On

the other hand, when reviewing a factual challenge, the allegations of the complaint are not presumed to be truthful, and the Court is not restricted to the face of the pleadings. See id., McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). The Court may review any evidence, such as declarations, documents and testimony, to resolve any factual disputes concerning jurisdiction. See id.

2. Motion to Dismiss for Failure to State a Claim

A motion to dismiss pursuant to Rule 12(b)(6) tests only the legal sufficiency of the claims asserted in the complaint. See Fed. R. Civ. P. 12(b)(6). The court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, the court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Circ. 1981).

In ruling on a Rule 12(b)(6) motion, the court generally cannot consider material outside the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider exhibits submitted with the complaint and documents "whose contents are alleged in [the] complaint and whose authenticity no party questions." Id. at 453-54. The court may also consider matters subject to judicial notice pursuant to Federal Rule of Evidence 201. Mir, M.D. v. Little Co. of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988).

B. Analysis

1. Count Three: Substantive Due Process Violation

Plaintiff alleges that the Ordinance as applied "violates Plaintiff's substantive due process rights by being an arbitrary, capricious and unreasonable exercise of Defendants' police powers." (Compl., ¶ 32.) Defendants argue ~~that under~~ Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc) and its progeny, Plaintiff is barred from bringing a substantive due process claim because the underlying allegations implicate the Fifth Amendment's Takings Clause. The Court agrees.

"Where an Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)) (internal quotations omitted); accord United States v. Lanier, 520 U.S. 259, 272 n.7 ("Graham . . . requires that if a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision not under the rubric of substantive due process"). Thus, where the challenged governmental conduct is regulated by the Fifth Amendment's Takings Clause, the conduct must be analyzed under the Takings Clause and the substantive due process claim is barred. Armendariz, 75 F.3d at 1319-24 (holding that the Graham rule precludes plaintiffs' substantive due process claim where that claim challenges the same conduct as any potential takings claim); Buckles v. King County, 191 F.3d 1127, 1117 (9th Cir. 1999) (affirming dismissal of the plaintiffs' substantive due process claim challenging the county's land use decision under Armendariz); Marci v. King County, 126 F.3d 1125, 1128 (affirming dismissal of substantive due process claim where the

alleged injury sounds like a takings claim). This rule reflects the principal that "the substantive due process clause must be expanded only with the greatest care and that its protection is primarily reserved for liberties deeply rooted in this Nation's history and tradition." Macri, 126 F.3d at 1128 (internal quotations omitted). It was precisely for this reason that this Court previously precluded Plaintiff from proceeding on a substantive due process claim in a prior action against Defendants. (See Defendants' Req. for Judicial Notice, Ex. J [August 1, 2000 Order by Hon. Dean D. Pregerson)] at 5-7.)

Plaintiff now attempts to distinguish Armendariz by arguing that the current substantive due process claim is "a claim that the City abused its power by exerting grave unfairness in the discharge of its duties to administer the rent control regulation." (Opp. at 23.) Plaintiff contends that such a claim is "separate from a claim that fair return has been confiscated." (Id.) Plaintiff cites Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951 (9th Cir. 1991), vacated in part on other grounds, 987 F.2d 662 (9th Cir. 1993), and Galland v. City of Clovis, 23 Cal. 4th 1003 (2001), in support of its argument. Plaintiff's argument is unavailing.

The Ninth Circuit has rejected similar substantive due process claims based on allegations that the government abused its power in the discharge of its duty to administer various land control regulations. See, e.g., Armendariz, 75 F.3d at 1319-20 (not allowing substantive due process claim premised on allegation that the defendants conducted sweeps of the plaintiffs' low-income housing units and closed the plaintiffs' properties for no legitimate governmental purpose); Buckles, 191 F.3d at 1137-38 (not allowing substantive due process claim premised on allegation that the plaintiffs were victims of an arbitrary and unreasonable zoning change whereby their property was singled out and zoned for a use classification totally different and incompatible with the classification of

surrounding land). The Court sees no distinction between such claims and a claim that "fair return has been confiscated" under Armendariz.

Moreover, the heart of Plaintiff's substantive due process claim lies in Plaintiff's allegation that "the City in an arbitrary, capricious and unreasonable exercise of it's police power excluded from legitimate operating expenses of the Park hundreds of thousands of dollars in operating expenses," which resulted in an "increase on paper [to] Plaintiff's 'perceived' fair rate of return" and caused Plaintiff to receive less of a rent increase than that to which it was entitled. (Comp., ¶¶ 34-35.)[4] Plaintiff's substantive due process claim is substantively indistinguishable from Plaintiff's regulatory takings claim, which expressly challenges Defendants' *application* of the Ordinance. Plaintiff "cannot sidestep Armendariz by re-characterizing their claim as lying . . . in substantive due process." Macri, 126 F.3d at 1129.

Plaintiff's reliance on Sierra Lake and Galland is misplaced. First, Sierra Lake, to the extent that it permitted a substantive due process claim under the facts of that case, is no longer good law after Armendariz. Indeed, Armendariz expressly overrules Sinaloa Lake Owners Ass'n v. Simi Valley, 882 F.2d 1398 (9th Cir. 1989) (as amended),[5] the authority

---

[4] The remaining allegations purport to identify the facts that support Plaintiff's claim that the City's February 2001 decision was arbitrary, capricious and unreasonable. (See id.) To the extent that Plaintiff's claim rests in part on allegations that implicate procedural due process considerations (e.g., complaint that Plaintiff was unable to confront witnesses), the claim must be analyzed as a procedural due process claim rather than a substantive due process claim.

[5] In Sinaloa Lake, property owners sued the municipal defendants under 42 U.S.C. § 1983, alleging that the defendants' actions in

(continued...)

upon which the Sierra Lake court relied in permitting the substantive due process claim. Armendariz, 75 F.3d at 1235-36; see Sierra Lake, 938 F.2d at 957-58 (quoting Sinoloa Lake, 882 F.2d at 1407).

Second, the Court declines to follow the California Supreme Court's recent decision in Galland to the extent that it purportedly supports Plaintiff's argument that the substantive due process claim should survive.[6] The Galland court failed to address whether the challenged actions were covered by a specific constitutional provision before reaching the conclusion that they implicated the more generalized notion of substantive

---

[5] (...continued)
breaching the owners' dam and draining their lake amounted to a taking of their property without just compensation, as well as a violation of their substantive and procedural due process rights. 882 F.2d at 1401, 1404, 1407. The court rejected the takings claim due to the plaintiffs' failure to exhaust their state remedies (id. at 1401-04) and held that the Fourth Amendment claim was "in fact, a taking claim which [was] property asserted under the fifth amendment" and, therefore, was also unripe (id. at 1411). With respect to the substantive due process claim, the court concluded that the plaintiffs had properly stated a claim upon which relief may be granted. Id. at 1410 (the "allegations paint a picture of government officials bent on destroying the dam for no legitimate reason and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes").

[6] In Galland, the plaintiffs alleged, inter alia, that they were "damaged in the amount of $247,885 for costs incurred as a result of the arbitrary and unreasonable administrative proceedings." 24 Cal. 4th at 1030. The California Supreme Court determined that this claim should be characterized as "a substantive, rather than . . . a procedural, due process claim because "the source of their injury was . . . the fact that [the city] made demands on them as a condition of obtaining a rent increase that, in addition to being costly, were intrinsically arbitrary and irrational." Id.

due process. See 24 Cal. 4th at 1030-40. Indeed, the lengthy opinion makes no reference to the principle espoused in Graham. Moreover, the court relied solely on either state cases, post-Graham cases from other circuits or pre-Armendariz cases from the Ninth Circuit to support its conclusion that the municipal defendants' egregious conduct in a land use regulatory dispute amounting to a "deliberate flouting of the law" violated the plaintiff's right to substantive due process. See id. at 1035-36.

In sum, the Court holds that Plaintiff is precluded from asserting a substantive due process claim in this case. Accordingly, the Court grants Defendants' motion to dismiss the substantive due process claim.

2. Counts Two & Six: Regulatory Takings

Plaintiff alleges that the Ordinance, as applied to Plaintiff by way of the February 2001 decision and the subsequent refusal to hear the April 2001 "regulatory lag" application, results in impermissible takings. (Compl., ¶¶ 27, 44.) Defendants argue that the Court lacks subject matter jurisdiction over the takings claims on the ground that they are not ripe.

It is well established that a regulatory takings claim is not ripe for adjudication until the two prong test set forth in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 186 (1986), has been satisfied. First, the plaintiff must obtain a "final decision" regarding the application of the challenged government regulation to the plaintiff's property. Williamson, 473 U.S. at 186, 194-95. Second, the plaintiff must pursue state remedies for just compensation, if adequate state procedures are available. Id.; see Macri, 126 F.3d at 1129. Defendants do not challenge Plaintiff's allegation that the "final decision" prong has been

satisfied. At issue is whether Plaintiff has satisfied the second prong of the test. Defendants argue that Plaintiff failed to utilize available state compensation remedies before filing this lawsuit.

A landowner may seek just compensation for an as-applied regulatory taking of property by bringing an "inverse condemnation" action in state court. See Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 689 (9th Cir. 1993). Plaintiff concedes that it did not bring such an action in state court before filing this action. However, Plaintiff argues that it need not and could not bring such an action because *at the time* Defendants rendered their final decisions, California did *not* provide a remedy of just compensation for regulatory takings in the rent control context. Plaintiff relies again on Galland and another California Supreme Court decision, Kavanau v. Santa Monica Rent Control Board, 16 Cal. 4th 761 (1997), in support of its assertion that "a landlord may not obtain inverse condemnation damages against a government agency for imposing confiscatory rent ceilings on the landlord." (Opp. at 15-16; see Compl., ¶ 30 (alleging that the state courts "do not provide an inverse condemnation damages remedy" for the challenged decisions in this case because under Kavanau and Galland, California "preclude[s] a claim for inverse condemnation damages and claims under 42 U.S.C. § 1983 due to the operation of rent control").) Plaintiff urges that under the circumstances, the Court should follow Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989) (holding that property owners' action was ripe for decision where California law provided no remedy for inverse condemnation at time of alleged taking), and similarly conclude that the regulatory takings claims here are ripe for adjudication.

Plaintiff's reliance on Kavanau and Galland is misplaced. Plaintiff either misreads or mis-characterizes the holdings of the two cases. "California [courts] ha[ve] recognized inverse

condemnation claims based on as-applied regulatory takings since the Supreme Court decided First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (holding that California's denial of compensation for inverse condemnation claims based on regulatory takings was unconstitutional)." Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 686 (9th Cir. 1993) (parenthetical in the original); accord Hoehne, 879 F.2d at 533-34. Prior to that time, a landowner was limited to seeking declaratory relief or mandamus to invalidate the offending regulation. See Hoehne, 879 F.2d at 533-34 (discussing California law before First English because "the appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occurs"). Contrary to Plaintiff's assertion, neither Kavanau nor Galland purports to change over a decade of jurisprudence by holding state law no longer provides a compensation remedy for a landlord in Plaintiff's position. The Court finds nothing in the language of those decisions to support Plaintiff's interpretation.[7] Cf. Santa Monica Beach, Ltd. v. Superior Court, 19 Cal. 4th 952 (1999) (post Kavanau decision addressing the merits of the rent controlled property owner's inverse condemnation claim; no suggestion that state

---

[7] The Kavanau court merely held that no actionable takings occurred under the facts of that case. See 16 Cal. 4th at 783-786 (dismissing the inverse condemnation claim for failure to state a claim and concluding that where, as here, a due process violation "is the sole basis" for a potential takings clause violation, and a remedy for the due process violation (via future rent adjustments) is available and adequate, that remedy provides sufficient compensation to satisfy the takings clause). And the Clovis court did not even address a takings claim. The appeal concerned only the landowner's § 1983 claim premised on due process violations. See 24 Cal. 4th at 1019, 1023 (noting that the trial court dismissed the inverse condemnation claim but awarded damages to the plaintiffs on their § 1983 claim, the court of appeals affirmed and the defendant appealed).

law no longer permits the recovery of compensation for a regulatory taking).

In sum, state court compensation remedies are available, but Plaintiff did not pursue such remedies before filing this action. Because Plaintiff's as-applied regulatory takings claims are not ripe, the Court lacks subject matter jurisdiction to hear these claims.

3. Counts Four and Five: Procedural Due Process Violations

In Count Four, Plaintiff alleges that the procedure by which the Board reached its February 2001 decision constitutes a violation of Plaintiff's right to procedural due process as guaranteed by the Fourteenth Amendment. (See Compl., ¶¶ 36-38.) In Count Five, Plaintiff alleges that Defendants' refusal to process Plaintiff's April 2001 application violates Plaintiff's right to procedural due process. (See id., ¶¶ 39-42.) Defendants raise several arguments in support of their motion to dismiss these claims. The Court addresses only the relevant arguments below.

Preliminarily, the Court rejects Defendants' argument that Armendariz, Macri and Buckles require the Court to disregard the "procedural due process label" (as it must disregard the "substantive due process" label) and treat these claims as takings claims. (Motion at 10-11.)[8] Macri and Buckles only rejected the property owners' attempt to escape the application of Armendariz by re-characterizing their takings claims as *substantive* due process claims. See Macri 126 F.3d at 1129; Buckles, 191 F.3d at 1137. The Ninth Circuit has not extended

---

[8] Defendants raise the same argument with respect to Plaintiff's equal protection claim. For the same reason stated herein, the Court rejects that argument.

this analysis to all constitutional claims that arise out of the application of a land use regulation. Cf. Armendariz, 75 F.3d at 1316 (en banc court noting that it does not revisit the three-judge panel's ruling that the plaintiffs have stated a claim for procedural due process violations and affirming the district court's denial of the defendants' motions for summary judgment on the plaintiffs' equal protection claim).

Next, Defendants argue that Plaintiff has failed to state a claim for a procedural due process violation because Plaintiff does not have a protected property interest in the requested rent increase. The Court agrees.

To prevail on a procedural due process claim, a plaintiff must satisfy a two part test. The plaintiff must first establish that "the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property.'" Ingraham v. Wright, 430 U.S. 641, 673 (1977). "[I]f protected interests are implicated," the plaintiff must then show that the state deprived her of that interest without "due process of law." Id. Here, Plaintiff has failed to meet the first part of the test.[9]

The party claiming a property interest under the Fourteenth Amendment "must have *more* than a unilateral expectation of it." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (emphasis added). He must have "a legitimate claim of entitlement to it." Id.; accord Bateson v. Geisse, 857 F.2d 1300, 1305 (9th Cir. 1988). Property interests "are not created by the Constitution." Roth, 408 U.S. at 577. Instead, property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of

---

[9] Therefore, the Court need not reach the second part of the test.

entitlement to those benefits." Id. Thus, for example, the Ninth Circuit in Bateson v. Geiss examined the applicable municipal ordinance to determine whether it created an entitlement to approval of the proposed minor plat (and issuance of a building permit) when evaluating the property owner's procedural due process claim against city and city council members who had refused to approve his minor plat. 857 F.2d at 1305. Because the ordinance at issue failed to set "any significant substantive restrictions on the City Council's powers" to approve or disapprove minor plat applications, the Bateson court concluded that the property owner did not have a legitimate claim of entitlement to approval of his proposed minor plat application. Id.

In this case, Plaintiff has failed to identify any source of law that purports to support Plaintiff's claim of *entitlement* to the requested rent increases. Indeed, Plaintiff's opposition does not even address this argument. (See Opp. at 21-22.) Nevertheless, the Court examines the Ordinance to determine whether it gives rise to a protected property interest. Like the ordinance in Bateson, the Ordinance does not set any significant *substantive* restrictions on the Board's powers to approve, conditionally approve or reject a rent control application. (See Defendants' Req. for Judicial Notice, Ex. A.) Whether a rent application should be approved or rejected is left to the broad discretion of the Board. (See id. at § 4704(f)(3) ("The Board *may approve* the rent increase requested, approve a modified rent increase or deny the application pursuant to the standards established by subsections (g) and (h) of this section . . ."); § 4704(g) ("The Board shall grant such increases *as it determines to be fair, just and reasonable*" after considering certain non-exhaustive factors) (emphasis added).)

Consequently, the Court concludes that Plaintiff does not have a legitimate claim of entitlement to approval of its two rent adjustment applications. Because Plaintiff does not have

a protected property interest in the requested rent increases, Plaintiff's procedural due process claims fail.

4. Count Seven: Equal Protection Violation

Plaintiff alleges that "[o]ther regulated businesses in the City are authorized and allowed to adjust costs and returns by the effects of inflation" whereas the Ordinance as applied "arbitrarily imposes a restrictive formula that penalizes Plaintiff for the effects of inflation." (Comp., ¶ 46.) Plaintiff asserts that "[t]here is no rational basis for distinguishing between those two classes of regulated businesses and such a classification is not rationally related to furthering" the Ordinance's "purported public purpose." (Id.) As a result, Plaintiff alleges that the Ordinance, as applied to Plaintiff, violated Plaintiff's constitutional right to equal protection. (Id.) Defendants argue, inter alia, that Plaintiff has failed to state a claim upon which relief may be granted.

The Fourteenth Amendment guarantees that "'no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.'" Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). "[S]tate action that does not implicate a fundamental right or a suspect classification passes constitutional muster under the equal protection clause so long as it bears a rational relation to a legitimate state interest." Armendariz, 75 F.3d at 1326. The "'rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary.'" Id. (quoting Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990) (as amended)).

Accepting as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them, the

Court concludes that Plaintiff's equal protection claim fails to state a claim upon which relief may be granted. The complaint alleges in a conclusory fashion that "[o]ther regulated businesses in the City" are allowed "to adjust costs and returns by the effects of inflation" when Plaintiff was not. (Compl., ¶ 46.) The complaint fails to identify the "other" businesses and alleges no facts which, if true, supports this conclusory allegation. See Western Mining Council v. Watt, 643 F.2d at 624 (on a Rule 12(b)(6) motion, the court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations); see also Sherman v. Yakahi, 549 F.2d 1287, 1289-90 (9th Cir. 1977) (holding a pleading fails to state a claim under the Civil Rights Act if the allegations are mere conclusions). The complaint also fails to allege that the unnamed "other regulated businesses" are similarly situated, i.e., businesses also subject to the Ordinance or, at a minimum, some other rent or price control regulation. That persons similarly situated received different treatment is a requisite element of a constitutional equal protection claim. See Lee, 250 F.3d at 686; see also Village of Willowbrook v. Olech, 528 U.S. 562, 563, 565 (2000) (holding the plaintiff could assert an equal protection claim where the complaint alleges that the Village intentionally demanded a 33-foot easement from the plaintiff as a condition of connecting her property to the municipal water supply when the Village required only a 15-foot easement from other "similarly situated property owners," i.e. owners seeking access to the same water supply). Because Plaintiff has failed to allege sufficient facts, the equal protection claim fails.

5. Count One: Violation of 42 U.S.C. § 1983

Plaintiff's § 1983 claim is premised upon the alleged deprivation of constitutional rights as set forth in Counts Two through Seven. In light of the Court's conclusions above,

Plaintiff does not have a viable § 1983 claim. Therefore, the Court grants Defendants' motion to dismiss this claim.

6. Count Eight: Supplemental State Petition for Writ of Administrative Mandamus

In Count Eight, Plaintiff seeks a writ of mandate under California Code of Civil Procedure section 1094.5 directing the Board to vacate its February 2001 decision and issue a different decision granting a $52.63 per space per month. (See Compl. at 25 [prayer for relief].) Having concluded herein that dismissal of all federal claims is warranted, the Court declines to exercise supplemental jurisdiction over the remaining state claim. See 28 U.S.C. § 1367(c)(3) (the district court "may decline to exercise supplemental jurisdiction over a [supplemental state] claim" if "the district court has dismissed all claims over which it has original jurisdiction").

III. DISPOSITION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss.[10] The Court hereby DISMISSES Plaintiff's substantive due process claim (Count Three), procedural due process claims (Counts Four and Five), equal protection claim (Count Seven) and § 1983 claim (Count One) pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court DISMISSES Plaintiff's regulatory takings claims (Counts Two and Six) pursuant to Federal Rule of Civil Procedure 12(b)(1). The Court declines to exercise subject matter jurisdiction over

---

[10] Plaintiff did not seek leave to amend the complaint in the event Defendants' motion was granted.

the supplemental state claim (Count Eight) and DISMISSES this claim pursuant to 28 U.S.C. § 1367(c)(3). The Court need not reach Defendants' alternative motion for abstention.

IT IS SO ORDERED.

DATED: June 11, 2002

/s/
ROBERT J. KELLEHER
United States District Judge

Appendix C-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARSON HARBOR VILLAGE, LTD., a Limited Partnership dba Carson Harbor Village Mobile Home Park,	)	No. 02-56213
	)	D.C. No. CV-01-04799-RJK
Plaintiff-Appellant,	)	ORDER
v.	)	Filed Mar 22, 2004
CITY OF CARSON, a Municipal Corporation; CARSON CITY MOBILEHOME PARK RENTALREVIEW BOARD,	)	
Defendants-Appellees,	)	
and,	)	
CARSON HARBOR VILLAGE MOBILEHOME PARK HOMEOWNERS ASSOCIATION, Real Party in Interest,	)	
Defendant.	)	

BEFORE: REINHARDT; O'SCANNLAIN and FISHER, Circuit Judges.

The panel judges have voted to deny appellant's petition for panel rehearing. Judges Reinhardt and Fisher have voted to deny the petition for rehearing en banc. Judge O'Scannlain voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and for rehearing en banc, filed February 17, 2004, is DENIED.

CHAPTER 7
MOBILEHOME SPACE RENT CONTROL

§ 4700 **Short Title.**

Chapter 7 of Article IV of the Carson Municipal Code may be cited as the "Mobilehome Space Rent Control Ordinance" of the City of Carson. (Ord. 79-485U)

§ 4701 **Definitions.**

For the purposes of this Chapter, the following words, terms and phrases shall be defined as follows:

(a) "Board" shall mean the Mobilehome Park Rental Review Board of the City of Carson.

(b) "Camping trailer" shall mean a vehicular portable unit mounted on wheels and constructed with collapsible partial sidewalls which fold for towing by another vehicle and unfold for occupancy, and designed for human habitation for recreational or emergency occupancy.

(c) "Capital improvement" shall mean improvements to a park, major refurbishment of a park and rehabilitation of a park which involve more than ordinary maintenance.

(d) "Department" shall mean the Community Development Department of the City of Carson.

(e) "Homeowner" shall mean an owner of a mobilehome in a mobilehome park in the City.

(f) "Mobilehome" shall mean a vehicle, designed or used for human habitation, including a camping trailer, travel trailer, motor home and slide-in camper, when used as the principal place of habitation for the occupants thereof.

(g) "Mobilehome space" shall mean the site within a mobilehome park intended, designed, or used for the location or accomodation of a mobilehome and any accessory structures or appurtenances attached thereto or used in conjunction therewith.

(h) "Motorhome" shall mean a vehicular unit built on or permanently attached to a self-propelled motor vehicle chassis,

chassis cab or van, which becomes an integral part of the completed vehicle, designed for human habitation for recreational or emergency occupancy.

(i) "Park Owner" shall mean an owner or operator of a mobilehome park or a person authorized to act on the owner's behalf in operating the park.

(j) "Rehabilitation" work shall mean any renovation or repair work completed on or in a mobilehome park which was performed in order to comply with the direction or order of a public agency, or to repair damage resulting from fire, earthquake, or other casualty.

(k) "Rent" shall mean the consideration paid for the use or occupancy of a mobilehome space.

(l) "Slide-in camper" shall mean a portable unit, consisting of a roof, floor and sides, designed to be loaded onto and unloaded from the bed of a pickup truck, and designed for human habitation for recreational or emergency occupancy and shall include a truck camper.

(m) "Tenancy" shall mean the right of a Homeowner to use or occupy a mobilehome space in a park in the City.

(n) "Resident Homeowner" shall mean a Homeowner who has a tenancy in the park and resides in the mobilehome in the park.

(o) "Travel trailer" shall mean a portable unit, mounted on wheels, of such size and weight as not to require special highway movement permits when drawn by a motor vehicle, and for human habitation for recreational or emergency occupancy. (Ord. 79-485U; Ord. 83-659; Ord. 86-768, § 1; Ord. 98-1130, § 2)

§ 4702 **Mobilehome Park Rental Review Board.** (section amended)

(a) The Mobilehome Park Rental Review Board is hereby established and shall consist of seven (7) members. In order to provide varied and balanced backgrounds, two (2) members shall be Resident Homeowners, two (2) members shall be Park Owners and three (3) members shall be At Large Members and

shall be residents of the City who are not Homeowners, Park Owners, landlords, property managers or tenants in multifamily housing. There shall also be three (3) Alternate Members; one (1) Alternate shall be a Resident Homeowner, one (1) Alternate shall be a Park Owner and one (1) Alternate shall be At Large. The terms of the Board Members shall be two (2) years and a Board Member shall continue to serve until a successor has been appointed. The terms of Board Members appointed following adoption of this Ordinance shall expire on March 31, 1999.

Each City Councilmember shall appoint one (1) of the Resident Homeowner or Park Owner Members and lots shall be drawn to determine whether a Councilmember appoints a Resident Homeowner or Park Owner Member, provided that no Councilmember shall appoint a Resident Homeowner Member or Park Owner Member in consecutive terms and a Councilmember shall appoint a Resident Homeowner Member if his or her previous appointment was a Park Owner and vice versa. The At Large Members shall be appointed by the Resident Homeowner and Park Owner Members. The Park Owner and Resident Homeowner Members shall hold a duly noticed meeting no later than twenty (20) days after their appointment to nominate and consider selection of the At Large Members. If the Park Owner and Resident Homeowner Members are unable by majority vote to agree on the appointment of the At Large Members at that meeting, then at that meeting, the two (2) Resident Homeowner Members shall nominate two (2) At Large candidates, the two (2) Park Owner Members shall nominate two (2) At Large Candidates and the three (3) At Large Members shall be chosen by lot from among the four (4) nominated At Large Candidates.

The alternate Resident Homeowner Member and alternate Park Owner Member shall be appointed by the Mayor, subject to the approval of the City Council. The At Large Alternate shall be chosen by the Resident Homeowner and Park Owner Members by the same procedure as set forth above for selecting At Large

Members, except that if they are unable to agree by majority vote on the At Large Alternate, the Resident Homeowner Members shall nominate only one (1) candidate and the Park Owner Members shall nominate only one (1) candidate; provided however that if the At Large Members were chosen by lot, then the At Large Alternate shall be the fourth candidate nominated for an At Large Alternate position who was not selected by lot.

If a vacancy occurs in a Resident Homeowner or Park Owner position the Councilmember who appointed that Board Member, or the Mayor if it is an alternate Resident Homeowner or Park Owner position, shall make an appointment to fill the vacancy. If a vacancy occurs in the At Large Alternate position, it shall be filled by the procedure set forth above for appointing At Large Alternates. If a vacancy should occur in the office of a Councilmember or Mayor, the tenure of the Board Member or Alternate appointed by such Councilmember or Mayor shall expire when the vacancy on the City Council or in the Mayor's office has been filled, at which time the successor Councilmember or Mayor shall make the appointment to that position. All appointments to the Board shall be made in an open session of the City Council or an open meeting of the Board.

An Alternate shall serve on the Board in the absence of a member of the Board. The Alternate to be called first, if available, shall have the same qualification as to home ownership or park ownership as the absent Board Member. If the Alternate Member with the same qualification as the absent Member should be unavailable, the At Large Alternate shall be called on to serve in place of the absent Member. A resident Homeowner Alternate shall not serve in place of a Park Owner Member and a Park Owner Alternate shall not serve in place of a Resident Homeowner Member.

(b) If a member of the Board is absent from three (3) successive regular meetings without being excused by the Board, or is absent for any reason for more than six (6) regular meetings in

any twelve (12) month period, the office of such member shall be vacated and the Chair shall immediately notify the City Manager, who shall notify the City Council that said office is vacant. Upon such notification, a successor for the remainder of the term of such member shall be appointed by the appointing authority for the member whose position is vacated.
(c) The Board shall establish the time of any hearings or meetings held pursuant to this Chapter and such hearings or meetings shall be held in the City Hall as often as the Board determines to be necessary to discharge its duties hereunder.
(d) The Board shall elect one (1) of its members as the Chair and said election shall be held as soon as practicable after each new term commences or new appointments are made to the majority of the Park Owner, Resident Homeowners and At Large Members. Four (4) Board Members, counting any Alternate serving in the absence of a Board Member, shall constitute a quorum. The decisions of the Board shall be made by a majority vote, provided however, that if the Board Members and any Alternates constituting the quorum do not include an equal number of Resident Homeowner and Park Owner Members and the Resident Homeowner and Park Owner Members present and voting are not outnumbered by At Large Members, including the At Large Alternate, then four (4) affirmative votes shall be required to reach a decision on a rent adjustment application.
(e) The duties and responsibilities of the Board shall include the following:
(1) The Board shall make any recommendations to the City Council the Board deems appropriate regarding the implementation and enforcement of the provisions of this Chapter.
(2) The Board shall hear rent adjustment applications and determine whether to approve, modify, or disapprove a rent adjustment pursuant to the procedures set forth in CMC 4704.
(3) The compensation of Board members, alternates and mediator shall be determined by the City Council. (Ord. 79-

485U; Ord. 80-519, § 1; Ord. 81-582, § 1; Ord. 82-614, § 1;Ord. 88-847, § 1; Ord. 92-983, § 2; Ord. 92-988U, § § 1, 3; Ord. 92-994U, § 1; Ord. 97-1113, § 1; Ord. 97-1127U, § 1; Ord. 98-1130, § § 3-5)

§ 4703 **Base Rent.**

Except as hereinafter provided, a Park Owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on May 1, 1979. If a previously rented mobilehome space was not rented on May 1, 1979, the Park Owner shall not demand, accept, or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to May 1, 1979. If a mobilehome space is rented for the first time after May 1, 1979, the Park Owner shall not demand, accept or retain rent for said space exceeding the rent first charged for the space. No Park Owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board. Except as herein provided, a Park Owner shall not demand, accept or retain rent exceeding the rent in effect on June 1, 1983, for a mobilehome space that was not regulated by this Section prior to the amendment of this Section on June 20, 1983. If such a mobilehome space was not rented on June 1, 1983, the Park Owner shall not demand, accept or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to June 1, 1983. (Ord. 79-485U; Ord. 80-504U; Ord. 83-695U, § 2; Ord. 98-1130, § 6)

§ 4704 **Permitted Rent Increases Based Upon Application Approved by the Board.**

(a) A Park Owner may file with the Department a rent increase application for one (1) or more mobilehome spaces for approval by the Board. A Park Owner, a Resident Homeowner or the Department may file an application for a rent adjustment for one (1) or more spaces pursuant to CMC 4704(h).

(b) An application for a rent adjustment pursuant to this Section shall be filed upon a form prescribed by the Department and shall be accompanied by the payment of a fee to be established by resolution of the City Council. The application shall specify the address of the mobilehome park, the space number or numbers for which rent is requested to be increased, the amount of the requested rent increase, the facts supporting the application. Supporting documentation shall be filed with the application and the applicant shall produce at the request of the Department any records, receipts, reports, or other documents that the Department may deem necessary for the Board to make its determination concerning the application. The application shall be made under penalty of perjury and supporting documents shall be certified or verified as requested by the Department.

(c) A rent increase application accompanied by the required fee shall be accepted and lodged by the Department but shall not be filed until it is substantially complete and the time periods provided by this Chapter for processing the application shall not begin to run until an application is substantially complete and filed. The Department shall determine within thirty (30) days after the lodging of an application whether said application is complete. If the Department determines that an application is not complete, it shall so notify the applicant in writing and the notice shall state what additional information is required to complete the application. An application which is substantially complete but lacks documentation to support certain claims can be processed for hearing, but any claimed expenses lacking adequate documentation shall not be allowed as operating expenses. Any application which has not been substantially completed within six (6) months of its submission to the Department shall be returned to the applicant. Thereafter, a new application and fee shall be required if the applicant wishes to apply for a rent increase.

(d) Upon receipt of a rent increase application, the Department shall mail a notice to the affected Homeowners informing them

that an application has been lodged and is being reviewed for completeness. The notice shall also state the amount of the increase being sought. Homeowners may review the application in the Department and may also obtain copies of the application upon payment of the City's copying costs. Upon determining that the application is substantially complete, the Department shall mail a notice to the applicant stating that the application is substantially complete and has been filed. At the same time, the Department shall mail a notice to the affected Homeowners stating that the application is substantially complete and informing them of the amount of the rent increase sought and that they have thirty (30) days from the date of the notice in which to submit written statements, photographs, documents, or other evidence relating to the application, to the Department. No written statements, photographs, documents, or other evidence relating to the application may be filed later than ten (10) days before the hearing on the application. All materials submitted by a Park Owner, Homeowner or any other interested party are public records, may be inspected and may be copied upon payment of the City's copying costs.

(e) The Board shall hold a public hearing on an application within sixty (60) days of the date that the application is determined to be substantially complete, except as provided in subsection (j) of this Section. Notice of the time, date and place of the hearing shall be mailed to the applicant and affected Homeowners at least fifteen (15) days prior to the hearing date. The Staff report on an application shall be provided to Board Members, and made available to the applicant, the Homeowners and their designated representatives, if any, at least five (5) days prior to the hearing.

(f) (1) At the public hearing, the applicant, affected Homeowners, their representatives and any interested person may offer any testimony that is relevant to the application. They may offer documents, written declarations, photographs or other written or documentary evidence for the first time at the hearing only if good cause is shown why such evidence

could not, with reasonable diligence, have been filed with the Department ten (10) days prior to the hearing and that the material was filed with the Department as soon as possible. Board Members and Alternates may testify at a hearing on a rent increase application only when they have recused themselves and the application involves a park in which they reside, have a financial interest or manage, or in which a parent, grandparent or siblings of the Board Member or Alternate resides.

(2) All persons testifying at the hearing shall be sworn under penalty of perjury. Formal rules of evidence shall not be applicable to the hearing.

(3) The Board may approve the rent increase requested, approve a modified rent increase or deny the application pursuant to the standards established by subsections (g) and (h) of this Section and shall adopt a written resolution setting forth its findings and decision no later than seventy-five (75) days after the application was deemed substantially complete.

(g) The Board shall grant such rent increases as it determines to be fair, just and reasonable. A rent increase is fair, just and reasonable if it protects Homeowners from excessive rent increases and allows a fair return on investment to the Park Owner. The Board shall consider the following factors and any Guidelines adopted by the City Council, as well as any other relevant factors, in making its determination and no one (1) factor shall be determinative.

(1) Changes in the Consumer Price Index for All Urban Consumers in the Los Angeles-Anaheim-Riverside Area published by the Bureau of Labor Statistics. If the Bureau of Labor Statistics subsequently changes the geographic reporting area in which the City is located, the Board shall use the most current applicable reporting area established by the Bureau.

(2) The rent lawfully charged for comparable mobilehome spaces in the City of Carson.

(3) The length of time since either the last hearing and final determination by the Board on a rent increase application or the

last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements related to the mobilehome space or spaces in the rent increase application, including such items of cost as materials, labor, interest, permit fees and other items as established by evidence and deemed relevant by the Board.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject Mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant.

(h) (1) The Board may provide that an increase in rent, or a portion of an increase in rent, granted by the Board be limited to the length of time necessary to allow the Park Owner to reasonably amortize the cost of a capital improvement, including interest and any costs necessary to the capital improvement, excluding attorneys' fees. Such increases shall not continue beyond the time necessary for reasonable amortization of the cost of such improvement and shall be listed separately from the base rent for a space on the monthly rent statement, invoice or bill provided to the Homeowners. When calculating general rent increases, any capital improvement rent increase shall not be included in the existing rent.

(2) If the cost of a capital improvement for which an increase was granted under this subsection is later recovered by the Park Owner from a third party before the expiration of the

amortization period approved by the Board, the Park Owner, any affected Homeowner or the Director of the Department or his designee, may file an application with the Department for the termination of the capital improvement rent increase on the ground that the Park Owner has recovered the cost of the improvement through insurance, litigation or other right of indemnity. The capital improvement rent increase shall be suspended pending determination of the application and if the application is denied the amortization period during which the increase may be collected shall be extended as necessary to allow the full amortization period originally allowed by the Board.

(3) Upon receipt of an application to terminate a capital improvement rent increase, and upon satisfactory proof of recovery of the cost of the improvement, such as, but not limited to, a court judgment or insurer's acknowledgment of coverage, the Director of the Department shall give notice of the application to the Park Owner and affected Homeowners and the capital improvement rent increase shall be terminated within fifteen (15) days unless within ten (10) days of the notice it is protested by the Park Owner on the ground that he or she has not in fact recovered the cost of the improvement. If satisfactory proof of recovery of the cost of the improvement is not submitted with the application, the Department shall give notice of that determination to the applicant, the affected Homeowners and the Park owner and the Director's decision shall become final within fifteen (15) days of the notice unless protested by the applicant or an affected Homeowner within fifteen (15) days of the notice. If a protest is filed by an affected Homeowner or the Park Owner, mailed notice shall be given to the affected Homeowners and Park Owner that the protest will be heard by the Board on a date not later than thirty (30) days after the filing of the protest. The notice shall be mailed no later than fifteen (15) days prior to the hearing and the Board shall make its decision by written resolution setting

forth its findings within forty-five (45) days after the filing of the protest. (Ord. 80-544, § 1; Ord. No. 83-655, § 1)

(i) Notice of the Board's determination on an application shall be mailed to the applicant, the Park Owner and all affected Homeowners at the mobilehome spaces designated in the application. The determination of the Board shall be final.

(j) The time in which the Board must open the hearing on an application and the time in which the Board must make any final decision may be extended with the consent of the applicant or Park Owner and may be extended without the consent of the applicant or Park Owner if the need for the extension is caused by the conduct of the applicant or the Park Owner. In the event the Board is unable to make its decision within the time limits set forth in this Chapter, including any extensions of time consented to by the applicant, the Board's inability to make a timely decision is not due to the conduct of the applicant or the Park Owner, or some cause beyond the Board's control, such as, but not limited to, fire, earthquake or flood, the Board shall at the time it grants any rent increase based on subsections (g) and (h) of this Section grant a temporary additional rent increase to the applicant to compensate the applicant for the difference between the rental income received between the time when an increase should have been granted pursuant to the time limits set forth in this Chapter and the rental income that would have been received if the increase had been timely granted.

(k) *Deleted by Ord. 98-1130.* (Ord. 79-485U; Ord. 80-544, § 1; Ord. 82-624, § § 1-4; Ord. 98-1130, § § 8-15)

§ 4705 Maximum Allowable Rent.

The maximum allowable rent ("MAR") for any mobilehome space in a park in the City is the last rent approved by the Board. Any park which has not sought approval of a rent increase from the Board by July 31, 1997 Ordinance (No. 98-1136) shall register, on a form provided by the Department, the rent for each space in the park on July 31, 1997, and the amenities and services provided to the Homeowners in the park

on that date without any charge beyond the rent in effect on that date, within thirty (30) days of the date this Ordinance (No. 98-1136) becomes effective. The rent so registered for each space shall become the MAR for that space unless that rent is challenged by a Resident Homeowner in the park within thirty (30) days after notice is sent by the Department to each Homeowner showing the rent that has been registered for each space. The challenge must be based on evidence showing that the rent registered exceeds that in effect in May of 1979 plus fifty (50) percent of the increase in the CPI since that date or exceeds the rent charged to the Resident Homeowner on July 31, 1997. Any challenge shall be submitted in writing to the Department. Upon receipt of the challenge, the Department shall notify the Park Owner that he or she has thirty (30) days in which to provide any information relevant to determining the MAR for the space or spaces for which the challenge has been filed. The Department shall set a public hearing to determine the MAR for each space for which a challenge has been filed no later than thirty (30) days after the expiration of the Park Owner's time to respond. Notice of the time, date and place of the hearing shall be mailed to the Park Owner and affected Homeowners no later than fifteen (15) days prior to the public hearing and no written or documentary evidence may be submitted later than ten (10) days prior to the hearing date. The hearing shall be held according to the provisions governing hearings on rent increase applications. The Board shall adopt a written resolution setting forth its findings and the MAR for the spaces for which a challenge was filed within fifteen (15) days after the date on which the public hearing is opened. No fee shall be charged for registering rents under this subsection or for filing a challenge to a rent or rents challenged pursuant to this subsection. (Ord. 98-1130, § 16)

§ 4706 Tenancies Not Governed by the Mobilehome Residency Law.

(a) A Resident Homeowner whose tenancy is not regulated by the provisions of the Mobilehome Residency Law (Civil Code Sections 798 through 799.6) shall not be charged a fee for anything other than rent or utilities with the exception of incidental reasonable charges for services actually rendered.

(b) A tenancy which is not subject to the provisions of the Mobilehome Residency Law (Civil Code Sections 798 through 799.6) shall not be terminated nor shall its renewal be refused, except for one (1) or more of the following reasons:

(1) Failure of the Homeowner to comply with a local ordinance or State law or regulation relating to mobilehomes within a reasonable time after the Homeowner receives a notice of noncompliance from the appropriate governmental agency.

(2) Conduct by the Homeowner, upon the mobilehome park premises, which constitutes a substantial annoyance to other Homeowners.

(3) Failure of the Homeowner to comply with reasonable rule or regulation of the mobilehome park. No act or omission of the Homeowner shall constitute such a failure to comply unless and until the Park Owner has given the Homeowner written notice of the alleged rule or regulation violation and the Homeowner has failed to adhere to the rule or regulation within seven (7) days.

(4) Nonpayment of rent, utility charges, or reasonable incidental service charges.

(5) Condemnation of the mobilehome park.

(6) Change of use of the mobilehome park, provided that:

(A) The Park Owner has complied with the provisions of Section 798.56 of the California Civil Code, Government Code Sections 65863.7 and 65863.8 and CMC 9128.21.

(B) The Park Owner gives the Homeowner written notice of the proposed change twelve (12) months or more before the date of the proposed change.

(C) The Park Owner gives each proposed Homeowner whose tenancy will commence within twelve (12) months of the proposed change, written notice thereof prior to the inception of his tenancy.

(c) Notice of termination or refusal to renew must be given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at least sixty (60) days prior to the termination date of the tenancy. Said notice shall state the date the tenancy terminates, the reason for the termination or refusal to renew, and the specific facts upon which the Park Owner is relying. (Ord. 79-485U; Ord. 92-965, § 11; Ord. 98-1130, § § 16, 17)

§ 4707 Refusal of Homeowner to Pay Illegal Rent.

A Homeowner may refuse to pay any rent in excess of the maximum allowable rent ("MAR") permitted by this Chapter. The fact that such unpaid rent is in excess of the MAR shall be a defense in any action brought to recover possession of a mobilehome space for nonpayment of rent or to collect the illegal rent. (Ord. 79-485U; Ord. 98-1130, § 18)

§ 4708 Remedies.

(a) Any person who demands, accepts or retains any payment of rent in violation of the provisions of this Chapter shall be liable in a civil action to the person from whom such payment is demanded, accepted or retained for damages in the sum of three (3) times the amount by which the payment or payments demanded, accepted, or retained exceed the maximum rent which could lawfully be demanded, accepted or retained together with reasonable attorneys' fees and costs as determined by the court.

(b) Any person violating any of the provisions of this Chapter shall be guilty of a misdemeanor and shall be punishable in the manner provided by CMC 1200.

(c) Code of Civil Procedure Section 1094.6 is applicable to decisions of the Mobilehome Park Rental Review Board

granting or denying rent increase applications and no legal challenge to any such decision of the Board may be brought unless it is filed within ninety (90) days of the Board's final decision, as set forth in its written resolution making findings. The Board's resolution granting or denying the increase shall state that the time within which judicial review must be sought is governed by Code of Civil Procedure Section 1094.6 and a copy of the resolution, including a certificate of mailing, shall be sent to the applicant, and to a representative of the residents of the affected mobilehome park, if one has been designated, by first class mail. (Ord. 79-485U; Ord. 94-1031, § 1)

§ 4709 City Council Review of This Chapter.

The City Council shall review the provisions of this Chapter six (6) months after the date of adoption thereof, and at any other time deemed appropriate, in order to consider the following:

(a) Whether mobilehome space rent control continues to be necessary to protect the public health, safety and welfare;

(b) Whether the implementation of the provisions of this Chapter have been adequate; and

(c) Whether the provisions of this Chapter should be amended to provide more effective regulations or to avoid unnecessary hardship. (Ord. 79-485U)

§ 4710 Lease Regulations.

No Park Owner may require, directly or indirectly, that any Homeowner or prospective Homeowner sign a lease or rental agreement that provides that it shall be exempt from local rent control or provides for space rent in excess of that permitted by this Chapter as a condition of tenancy in the park and no Park Owner may deny a tenancy to a prospective purchaser of a mobilehome in the park on the ground that the prospective purchaser will not sign such a lease or rental agreement. (Ord. 91-941U, § 1; Ord. 91-941, § 1; Ord. 92-970U, § 2; Ord. 92-970, § 2; Ord. 98-1130, § 19)

§ 4711 Utility Fees - Registration and Posting.

(a) Not less than ninety (90) days prior to imposing a separate charge for a utility service previously included in the rent pursuant to Civil Code Section 798.41, a Park Owner shall file notice thereof with the Department on a form provided by the City, which specifies the current rent for each space, the new charge to be imposed, the duration and expiration date of the separate charge if it has a limited duration or is amortized for a specified period, the rent reduction to be made simultaneously with imposition of the charge, the calculation of the new charge and rent reduction and the new MAR for each space.

(b) Not less than ninety (90) days prior to imposing, increasing, decreasing or eliminating a charge separately billed pursuant to Civil Code Section 798.49, a Park Owner shall file a notice with the Department on a form provided with the City which specifies for each space the current rent, the amount of the new charge or charge eliminated or the amount of any increase or decrease in an existing charge, the fee or assessment on which the charge or change therein is based, the basis for the amount of the charge or any change therein and the duration and expiration date of the charge if it has a limited duration or is amortized for a specified period.

(c) Within ten (10) days of executing any rental agreement or lease which is exempt from this Chapter pursuant to Civil Code Section 798.17, a Park Owner shall register that lease with the Department on a form provided by the City, which specifies the beginning and ending date of the lease and the rental rate(s) applicable during the duration of the lease, and shall attach thereto a copy of the lease.

(d) Every Park Owner shall post a copy of this Chapter in the park office or manager's office and in any clubhouse, recreation building or room, auditorium or assembly room, shall give each prospective Homeowner and Resident a copy of this Chapter before the prospective Homeowner executes any lease or rental agreement with the park and shall file a signed receipt from each new Homeowner acknowledging receipt of a copy of this

Chapter prior to execution of any lease or rental agreement with the Department within five (5) days of execution of the lease or rental agreement. (Ord. 92-970U, § 1; Ord. 92-970, § 1; Ord. 93-1000U, § 1; Ord. 93-1000, § 1; Ord. 98-1130, § 20)

CHAPTER 8
SALE AND DISPLAY OF NARCOTIC AND OTHER PARAPHERNALIA

§ 4800 Minors.

No owner, manager or proprietor in charge of any room in any place of business selling, or displaying for the purpose of sale, any device, contrivance, instrument or paraphernalia for smoking or injecting or consuming marijuana, hashish, PCP, or any controlled substance, as defined in the Health and Safety Code of the State of California (other than prescription drugs and devices to ingest or inject prescription drugs), roach clips, cigarette papers and rollers designed for the smoking of the foregoing, shall allow or permit any person under the age of eighteen (18) years to be, remain in, enter or visit such room unless such minor person is accompanied by one (1) of his or her parents, or by his or her legal guardian. (Ord. 81-578, § 1)

§ 4801 Minors - Excluded.

A person under the age of eighteen (18) years shall not be, remain in, enter or visit any room in any place used for the sale, or displaying for sale, devices, contrivances, instruments or paraphernalia for smoking or injecting marijuana, hashish, PCP, or any controlled substance (other than prescription drugs and devices to ingest or inject prescription drugs), including roach clips, and cigarette papers and rollers designed and used for smoking the foregoing, unless such person is accompanied by one (1) of his or her parents, or his or her legal guardian. (Ord. 81-578, § 1)

(2)

Supreme Court, U.S.
FILED
AUG 18 2004
OFFICE OF THE CLERK

No. 04-115

In The Supreme Court of the United States

CARSON HARBOR VILLAGE, LTD.,
a Limited Partnership dba Carson Harbor
Village Mobile Home Park,

Petitioner,

vs.

CITY OF CARSON, a Municipal Corporation,
CITY OF CARSON MOBILEHOME PARK
RENTAL REVIEW BOARD; and CARSON HARBOR
VILLAGE MOBILEHOME PARK HOMEOWNERS
ASSOCIATION, Real Party in Interest,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROCHELLE BROWNE
Counsel of Record
RICHARDS WATSON & GERSHON
355 South Grand Avenue,
40th Floor
Los Angeles, California
90071-3101
(213) 626-8484
(213) 626-0078 (fax)
Counsel for Respondents City of Carson and City of Carson Mobilehome Park Rental Review Board

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioner should be allowed to evade the ripeness requirements for as-applied takings claims, which were established by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and have been uniformly applied by the Circuits, by *speculating* that the compensation remedy provided by the California courts may prove to be inadequate?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
I. THE NINTH CIRCUIT'S HOLDING IN THIS CASE IS CONSISTENT WITH THOSE OF THE OTHER CIRCUITS AND IS CLEARLY CORRECT	6
A. Petitioner's Claim That The California Remedy Is Inadequate Is Speculative And Mistaken	6
B. The Ninth Circuit, Like The Other Circuits, Finds An Exception To *Williamson*'s Second Prong Only When It Is Almost Certain That State Court Remedies Are Inadequate	8
II. THIS CASE DOES NOT PRESENT ANY ISSUE OF NATIONAL IMPORTANCE	13
III. THIS CASE INVOLVES UNIQUE FACTUAL AND PROCEDURAL ISSUES THAT MAKE IT INAPPROPRIATE FOR REVIEW BY THIS COURT	14
CONCLUSION	17
APPENDIX A – Excerpt from Motion to Dismiss Complaint Pursuant to Rule 12b of the Federal Rules of Civil Procedure	Resp. App. 1
APPENDIX B – Excerpt from Appellee's Answering Brief	Resp. App. 4

TABLE OF CONTENTS – Continued

Page

APPENDIX C – Excerpts of the Guidelines for Implementation of the Mobilehome Space Rent Control Ordinance.....Resp. App. 6

APPENDIX D – Resolution No. 2001-212: A Resolution of the Carson Mobilehome Park Rental Review Board Granting a Rent Increase for Carson Harbor Village Mobilehome Park .....Resp. App. 18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Carson Harbor Village, Ltd. v. City of Carson ("*Carson Harbor I*"), 37 F.3d 465 (9th Cir. 1994) 16

Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988) 12

Del Monte Dunes v. City of Monterey, 920 F.2d 1497 (9th Cir. 1990) 11

First English Lutheran Church v. Los Angeles County, 428 U.S. 304 (1987) 7

Rolf v. City of San Antonio, 77 F.3d 823 (5th Cir. 1996) 12

Smaad v. City of Dallas, 940 F.2d. 925 (5th Cir. 1991) 11, 12

United States v. Dickinsin, 152 F.2d 865 (4th Cir. 1946) 14

Williamson County Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) ..... *passim*

Yee v. City of Escondido ("*Yee I*"), 503 U.S. 519 (1992) 9, 10

CALIFORNIA CASES

Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Board ("*Carson Harbor II*"), 70 Cal.App.4th 281, 82 Cal.Rptr.2d 569 (1999) 15

Galland v. City of Clovis, 24 Cal.4th 1003, 103 Cal.Rptr.2d 711, 16 P.3d 130 (2001) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Hensler v. City of Glendale, 8 Cal.4th 1, 32 Cal.Rptr.2d 233, 876 P.2d 1043 (1997) 10

Kavanau v. Santa Monica Rent Control Board ("*Kavanau I*"), 19 Cal.App.4th 730, 23 Cal.Rptr.2d 244 (1993) 6, 7

Kavanau v. Santa Monica Rent Control Board ("*Kavanau II*"), 16 Cal.4th 761, 66 Cal.Rptr.2d 672, 941 P.2d 851 (1997) ..... *passim*

Montclair Mobilehome Parkowners Association v. City of Montclair, 76 Cal.App.4th 784, 90 Cal.Rptr.2d 598 (1999) 9

Yee v. Mobilehome Park Rental Review Board ("*Yee III*"), 62 Cal.App.4th 1409, 73 Cal.Rptr.2d 227 (1998) 9, 10

FEDERAL STATUTES

42 U.S.C. Section 1983 8

CALIFORNIA STATUTES

Code of Civil Procedure Section 1005 ..... 8, 10

Code of Civil Procedure Section 1085 ..... 8, 10

Code of Civil Procedure Section 1088.5 ..... 8, 10

Code of Civil Procedure §1094.5 ..... 2, 8, 10

MISCELLANEOUS

Salzberg, Kenneth, *"Takings" as Due Process, or Due Process as "Takings"?*, 36 Val. U.L. Rev. 413 (2002) 14

RESPONDENTS' BRIEF IN OPPOSITION

Respondents City of Carson and City of Carson Mobilehome Park Rental Review Board respectfully submit that this case presents no grounds for review and that review should be denied.

STATEMENT OF THE CASE

This case involves an unremarkable application of the well-settled ripeness test established by this Court in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), for as-applied takings claims. The claim of Petitioner Carson Harbor Village, Ltd. ("CHV") that the Ninth Circuit decision in this case creates a Circuit split concerning the application of the *Williamson* rule is based on a *mischaracterization* of the decision; there is no Circuit split on the issues presented by this case. CHV's further claim that this Court should decide whether just compensation can consist of payments from third parties rather than from government coffers is essentially a request for an *advisory* opinion as that issue is not raised by this case.

Williamson provides a two-pronged test for determining whether an as-applied takings claim is ripe. In order to state a ripe federal takings claim, a property owner must first (1) obtain a final decision from the local agency concerning how the challenged regulation will be applied to his property (*Id.* at 186); and (2) exhaust state court compensation remedies (*Id.* at 194). *Williamson* also recognizes an exception to the second prong when state

court compensation remedies are inadequate or unavailable. *Id.* at 195. Contrary to CHV's claims, that exception does *not* apply in this case.

CHV claims that a decision of respondent City of Carson Mobilehome Park Rental Review Board (the "Board"), which granted CHV a smaller than requested rent increase, denied CHV a fair return and constituted a taking of CHV's mobilehome park property. CHV *admitted* that it had not satisfied the *Williamson* requirement that it exhaust state court compensation remedies before it filed its takings claim in the District Court.[1] CHV also *admitted* that, in general, the California courts provide an adequate compensation remedy, but claimed that remedy is not available in cases challenging rent control decisions. However, CHV *did not, and could not, point to a single California decision in which the remedy provided by a California court in a rent control case was inadequate.* (App. A-13) The Ninth Circuit, therefore, held that the alleged inadequacy of the California remedy was "highly speculative;" that, at best, CHV had shown only that the remedy was "untested and uncertain;" and that this was insufficient to justify CHV's failure to utilize state court compensation remedies. (App. A-13-14)

---

[1] CHV's complaint was brought under 42 U.S.C. §1983 and also alleged violations of substantive due process, procedural due process and equal protection, as well as a pendant state law claim under California Code of Civil Procedure §1094.5. The District Court dismissed these federal claims for failure to state a claim upon which relief can be granted and dismissed the pendant state claim without prejudice. The Ninth Circuit affirmed those rulings and CHV did not challenge those rulings in its petition for rehearing in the Ninth Circuit or in its Certiorari Petition.

CHV's attempt to manufacture a conflict between that ruling and the decisions of other Circuits is based on the *erroneous* assertion that the Ninth Circuit held that state court compensation remedies must be used even "when the state's supreme court has held that inverse condemnation is not available for this class of takings claims." (Petition, First Question Presented) That is *not* what the Ninth Circuit held. Rather, it held that CHV did not show that the remedy provided by the California courts is inadequate and that CHV's takings claim was, therefore, unripe. (App. A-13 and 14)

CHV further attempts to create the impression that this case presents an issue of national importance by claiming that California's procedures "cannot lead to the payment of just compensation by the government" and provides only the "untested prospect of obtaining offsetting revenues from private third parties." (Petition, Second Question Presented) However, this claim is based on a *mischaracterization* of the procedures provided by the California courts and of the California Supreme Court decisions in *Kavanau v. Santa Monica Rent Control Board* ("*Kavanau II*"), 16 Cal.4th 761, 66 Cal.Rptr.2d 672, 941 P.2d 851 (1997), and *Galland v. City of Clovis*, 24 Cal.4th 1003, 103 Cal.Rptr.2d 711, 16 P.3d 130 (2001). Neither *Kavanau II* nor *Galland* involved how just compensation for a taking should be provided nor did either address the person or entity that must provide the compensation when a taking is found. Instead, *Kavanau II* found no taking in the circumstances of that case (*Id.*, 16 Cal.4th at 783) and the plaintiff in *Galland* did not claim a taking (*Id.*, 24 Cal.4th at 1020, 1024). Moreover, *Galland* expressly holds that there are circumstances in the rent control context in

which landlords can state an inverse condemnation, or takings claim, and obtain just compensation from the local government that caused the taking. *Id.*, 24 Cal.4th at 1025. Thus, CHV is mistaken in claiming the California remedy provides only for receiving compensation from third parties and the "important question of national importance" alleged by CHV is not presented by this case. CHV is asking for an advisory opinion.

Thus, the two grounds, a Circuit split and an important issue of national importance, claimed as grounds for granting review in this case do not, in fact, exist. This case does not merit review by this Court and accepting CHV's claim would allow every dissatisfied landlord in the more than 100 California local agencies with rent control ordinances to immediately challenge the application of those ordinances in the federal courts without exhausting state court remedies.

Further, the Court should be aware that CHV has filed an action in the Los Angeles Superior Court (Case No. BS 077148) that challenges the very same decision by the Board on which CHV's takings claim in this case is based. That action is set for trial on October 6, 2004, and final judgment in that case could affect the issues in this case and might obviate the need to address CHV's takings claim.

The Court should also be aware that failure to use state court compensation remedies is not the only reason CHV's takings claim is unripe. Although CHV and the decisions below state it is undisputed that the first, or "final decision," prong of the *Williamson* ripeness test has been satisfied in this case, that is *not* true. The Board and

respondent City of Carson (the "City") asserted in both the District Court and Ninth Circuit that CHV's takings claim was also unripe for failure to satisfy the first prong of the *Williamson* test. (Resp. App. 2, 5) The City's mobilehome rent control ordinance (the "Ordinance") and the Guidelines for Implementing the Ordinance (the "Guidelines") provide for a fair return rent increase application when an applicant thinks the other rent increases allowed by the Ordinance are insufficient to provide a fair return. (Resp. App. 15-17)[2] CHV could have made such an application at the same time it made the rent increase application that is the subject of this action (Resp. App. 15), but did not. As a result, CHV did not provide the information necessary to determine a fair return application (Resp. App. 15-17) and it is impossible to know the highest rent that CHV could charge or the highest return CHV could earn under the Ordinance. The Court should further be aware that the City's motion to dismiss CHV's takings claim was also based on *res judicata* and issue preclusion arising from numerous prior lawsuits brought by CHV against the City and the Board. (App. A-14; B-2 and 3)

Thus, in addition to the lack of grounds for review in this case, there are factual and procedural issues, as well as *res judicata* issues, unique to this case that make it inappropriate for review by this Court.

---

[2] The District Court granted the City's request for judicial notice of the Ordinance, the Guidelines for Implementation of the Ordinance, the Resolution granting the rent increase challenged by CHV in this case and the judgments and opinions in several prior lawsuits brought by CHV against the City and the Board. (App. B-3, fn.2)

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S HOLDING IN THIS CASE IS CONSISTENT WITH THOSE OF THE OTHER CIRCUITS AND IS CLEARLY CORRECT

A. Petitioner's Claim That The California Remedy Is Inadequate Is Speculative And Mistaken.

CHV alleged that by granting it a smaller rent increase than it desired, the Board denied CHV a fair return and took its property. The Ninth Circuit upheld the dismissal of this claim as unripe because CHV had not first sought compensation through the California courts. CHV admitted that the second prong of the *Williamson* ripeness test for takings cases requires a claimant to exhaust state court compensation remedies; admitted that, in general, California provides an adequate compensation remedy; and admitted that it had not sought compensation in the California courts before bringing this action. However, CHV attempts to place this case within the exception to *Williamson*'s second prong by claiming that California does not provide an adequate compensation remedy for takings arising in the context of rent control decisions.

CHV's claim is based on an *erroneous* reading of the California Supreme Court decision in *Kavanau II*, *supra*. The landlord in *Kavanau II* had prevailed in an earlier action, *Kavanau v. Santa Monica Rent Control Board* ("*Kavanau I*"), 19 Cal.App.4th 730, 23 Cal.Rptr.2d 244 (1993), which challenged a rent increase granted by the Santa Monica Board as inadequate and unconstitutional. *Kavanau I* remanded the matter to the Santa Monica Board to grant a larger rent increase consistent with the court's opinion and the Board promptly did so. *Kavanau II*, 16 Cal.4th at 767. The plaintiff landlord then filed *Kavanau II*,

claiming entitlement to compensation for a temporary taking.

In *Kavanau II*, the California Supreme Court noted that *Kavanau I* did not state the nature of the constitutional violation found (*Kavanau II,* 16 Cal.4th at 777) and analyzed the facts of *Kavanau I* under both takings and due process precedents (*Id.* at 770-777). In doing so, the California Supreme Court expressly recognized that compensation is required for takings and temporary takings:

> " . . . [t]he property owner may bring an inverse condemnation action, and if it prevails, the regulatory agency must either withdraw the regulation or pay just compensation. Even if the agency withdraws the regulation, the property owner may have a right to just compensation for the temporary taking while the regulation was in effect." *Kavanau II*, 16 Cal.4th at 773, citing to *First English Lutheran Church v. Los Angeles County*, 428 U.S. 304, 317, 321.

Applying the takings precedents of this Court to the facts in *Kavanau I*, the California Supreme Court concluded that "Kavanau's allegations, if true, are not sufficient to establish a taking." *Kavanau II* at 780. Thus, *Kavanau II* did not, as CHV claims, hold that compensation is not available for takings in the rent control context; it found no taking. A finding of no taking based on a particular set of facts cannot be transmuted into a finding that the California courts will not provide just compensation when a taking occurs. However, *Kavanau II* found that the Santa Monica Board had violated substantive due process and held that compensation must be paid to the landlord for that violation in the form of "an adjustment of

future rents that takes into consideration past confiscatory rents." *Id.* at 783. This requirement is now known as a "*Kavanau* adjustment."

Significantly, *Kavanau II* also expressly recognized that situations could arise in which a further compensation remedy might be required because a *Kavanau* adjustment was inadequate. *Id.* at 785. The California Supreme Court's subsequent decision in *Galland v. City of Clovis, supra*, which also involved a rent control decision, further held that a landlord can state an inverse condemnation claim against the government under state law or a takings claim under 42 U.S.C. Section 1983 upon a showing that:

> "(1) that a confiscatory rent ceiling . . . was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate." *Id.*, 24 Cal.4th at 1025.

CHV ignores this holding in *Galland* and instead cites only to a dissent from the majority holding.

B. The Ninth Circuit, Like The Other Circuits, Finds An Exception to *Williamson*'s Second Prong Only When It Is Almost Certain That State Court Remedies Are Inadequate.

CHV claimed in its District Court and Ninth Circuit briefs, and claims again now, that the writ of mandate procedure provided by California Code of Civil Procedure Sections 1085, 1088.5, 1094.5 and 1005 is inadequate because the most a landlord could obtain if it prevailed would be a writ of mandate setting aside the rent control board's decision and a remand to the hostile board that rendered the invalid decision in the first place. However, it

is clear from *Kavanau II* and *Galland* that a remand would include an order that a *Kavanau* adjustment be provided and that if that adjustment is not sufficient to avoid a taking, a landlord could then state an inverse condemnation or takings claim.

Further, *CHV did not point to a single case in which a landowner had failed to receive adequate compensation through California's procedures.* (App. A-13) As the Ninth Circuit correctly held, it would not be proper to assume the accuracy of CHV's prediction that the remedy provided by those procedures will prove to be inadequate. (App. A-13) CHV now cites to *Montclair Mobilehome Parkowners Association v. City of Montclair*, 76 Cal.App.4th 784, 90 Cal.Rptr.2d 598 (1999) and *Yee v. Mobilehome Park Rental Review Board* ("*Yee III*"), 62 Cal.App.4th 1409, 73 Cal.Rptr.2d 227 (1998), as support for its claim that the California courts will not grant an adequate remedy. However, neither case supports CHV's claim. *Montclair* has no bearing whatsoever on the issues raised by this case. It did not address the adequacy of a particular rent increase or the application of an ordinance, as this case does. Rather, *Montclair* involved a *facial* challenge to an ordinance provision limiting rent increases when a home is sold in place in a mobilehome park, which is commonly referred to as vacancy control, and upheld the ordinance as facially valid.

Yee III was preceded by *Yee v. City of Escondido* ("*Yee I*"), 503 U.S. 519, 523 (1992), which held that vacancy control is not a physical taking, and was also preceded by *Yee v. Mobilehome Park Rental Review Board* ("*Yee II*"), an unreported decision which found a $40 rent increase granted by that Board inadequate, remanded the matter to the Board for a larger increase consistent with the

decision and ordered the trial court to determine the amount of the necessary rent increase because the Escondido Board had not fully complied with the court's order. *Yee III*, 62 Cal.App.4th at 1416. This was all *before* the *Kavanau* decision and *before* the *Galland* decision. In *Yee III*, the Yees claimed a taking based on lost profits before the larger rent increase was granted by the court in *Yee II* and the *Yee III* court remanded the matter with directions to grant a *Kavanau* adjustment to compensate for that lost revenue. *Yee III*, 62 Cal.App.4th at 1425.[3]

As *Hensler v. City of Glendale*, 8 Cal.4th 1, 32 Cal.Rptr.2d 233, 876 P.2d 1043 (1997), explains, judicial review by petition for writ of mandate under Code of Civil Procedure Section 1085 or 1094.5 is part of the administrative process and there is no final decision until that process has been completed. *Id.* at 17. California Code of Civil Procedure Sections 1085, 1088.5 and 1094.5 provide a prompt remedy (a petition for writ of mandate can be set for trial by motion upon 21 to 26 days' notice pursuant to Section 1005) and these procedures are intended to forestall constitutional or other injury by providing prompt relief from erroneous administrative decisions. *Id.* at 27.

CHV further claimed that it would be difficult to collect the *Kavanau* adjustment from the mobilehome owners who rent spaces for their homes in mobilehome parks because they might have moved away. However, because mobilehomes are not really mobile and are sold in place in mobilehome parks, *Yee I*, 503 U.S. at 523, there

---

[3] *Kavanau II* was decided after the oral argument in *Yee III* and this issue was decided on supplemental briefs. *Id.*, 62 Cal.App.4th at 1424.

are rarely spaces on which rent is not being paid. And, as explained in *Galland*, if the *Kavanau* adjustment proves inadequate, the park owner will have an inverse condemnation or takings claim.[4]

CHV's claim that the Ninth Circuit decision in this case creates a split with other circuits is based on the *erroneous* assertions that the decision: (1) recognized that the compensation remedies provided by California are inadequate (Petition at 3); and (2) held that a plaintiff must utilize those remedies even though they are inadequate (First Question Presented and Petition at 3). That is not what the Ninth Circuit held. It held that, while CHV presented serious questions concerning California's remedies in the rent control context:

> "the alleged inadequacy of the procedures remains highly speculative. Carson Harbor has not sought a writ of mandate and *Kavanau* adjustment, nor has Carson Harbor identified any landowner who has sought and failed to receive adequate compensation through these procedures. At best, Carson Harbor has merely alleged that new compensation remedies are 'untested or uncertain'" *Del Monte Dunes*, 920 F.2d at 1507. Under our precedents, that is not enough to qualify for an exemption from *Williamson's* second ripeness requirement." App. A-13.

That ruling is consistent with that of the other Circuits, including the Circuit decisions cited by CHV. *Smaad*

---

[4] CHV's claim now that payments by third parties cannot constitute just compensation within the meaning of the takings clause was not asserted by CHV until it filed a petition for rehearing in the Ninth Circuit. This claim is discussed in Part II, *infra*.

v. City of Dallas, 940 F.2d. 925 (5th Cir. 1991), cited by CHV, held that before a claimant can be excused from seeking compensation in state court, "it must be certain that the state *would* deny that claimant compensation were he to undertake the obviously futile act of seeking it." *Id.* at 934 (emphasis in original). *Smaad* then dismissed the takings claim as unripe because the "unsettled status of state law does not render the available procedures 'inadequate.'" *Id.* at 936. *Coniston Corp. v. Village of Hoffman Estates* 844 F.2d 461 (7th Cir. 1988), also cited by CHV, was not a takings case, but stated that "suit for just compensation is not ripe until it is apparent that the state does not intend to pay compensation." *Id.* at 463. *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996), another case cited by CHV, explained that "state procedures are inadequate when they '*almost certainly* will not justly compensate the claimant'" and are "adequate even though its law is unsettled whether the claimant would be entitled to compensation." *Id.* at 826-827 (emphasis in the original). *Rolf* concluded that Texas law was unsettled and dismissed the takings claim. Each of these cases held, as did the Ninth Circuit in this case, that state law compensation remedies were uncertain or untested, and dismissed the takings claim as unripe for failure to utilize state court compensation remedies.

The two cases cited by CHV which exempted the claimant from *Williamson*'s second prong applied the very same rule articulated in the above cases and by the Ninth Circuit in this case. However, they involved situations, unlike the situation in this case, in which it was *certain* that the state would not provide compensation. The Ninth Circuit decision in this case is consistent with those of the other Circuits cited by CHV. It is also clearly correct. The

Ninth Circuit has repeatedly held that California's remedies are sufficient (App. A-8) and CHV does not dispute those rulings.

CHV has not utilized California's remedies in this case and cannot point to any case showing that use of the procedures outlined by the California Supreme Court in *Kavanau II* and *Galland* resulted in the denial of adequate compensation for a taking. All that CHV has presented is speculation that those remedies will prove to be inadequate. (App. A-13) The Ninth Circuit held in this case, as have all the Circuit decisions cited by CHV, that uncertain and untested remedies must be used and do not excuse compliance with *Williamson*'s second prong. (App. A-13)

II. THIS CASE DOES NOT PRESENT ANY ISSUE OF NATIONAL IMPORTANCE

In order to create the impression that this case presents the question of whether just compensation may come from third parties rather than from government coffers, CHV wrongly asserts that California's procedures provide only for compensation to be paid by private third parties in cases involving the application of rent control ordinances because it is the tenants who provide compensation by paying both a rent increase and a *Kavanau* adjustment. However, while *Galland* provides for a remand and a *Kavanau* adjustment to *prevent* a taking, it further provides that if a *Kavanau* adjustment does not provide sufficient compensation to avoid a taking, an inverse condemnation or a takings claim can be brought against the governmental agency. *Galland*, 24 Cal.4th at 1025. Thus, this case does not present the question of whether compensation paid by third parties rather than government satisfies the just

compensation requirement of the takings clause. Accordingly, any discussion of that question in this case would necessarily be *dicta* and constitute an advisory opinion.

Moreover, CHV's citations to claim that compensation is "just" within the meaning of the takings clause only if it is paid from government coffers do not support its claim. *"Takings" as Due Process, or Due Process as "Takings"?*, 36 Val. U.L. Rev. 413, 420 n.42 (2002), cited by CHV, is a law review article criticizing Supreme Court takings jurisprudence. The portion cited by CHV addresses the historical criticism of applying the takings clause to regulations instead of just to the physical taking of property and does not address the issue of whether just compensation can ever come from third parties. *United States v. Dickinsin*, 152 F.2d 865 (4th Cir. 1946), also cited by CHV, is a case under the Tucker Act in which the government admitted liability for flooding the plaintiffs' land and the issue was how much each of the plaintiffs should be compensated by the government. The case does not address who must pay the compensation because the government admitted liability and was prepared to provide compensation (*Id.* at 868) and the case has no application to a regulatory taking claim such as that in this case.

III. THIS CASE INVOLVES UNIQUE FACTUAL AND PROCEDURAL ISSUES THAT MAKE IT INAPPROPRIATE FOR REVIEW BY THIS COURT

CHV has filed an action in the Los Angeles Superior Court (Case No. BS 077148) that challenges the very same decision of the Board that CHV challenges in this case and duplicates the pendant state law claim that was dismissed by the District Court when it dismissed CHV's takings

claim as unripe. (App. A-3, fn.2) The state law action is set for trial on October 6, 2004, and the final judgment in that case could affect the issues in this case and might eliminate the need to address CHV's takings claim. Thus, this is not an appropriate case on which to expend Supreme Court resources.

Moreover, failure to exhaust state court compensation remedies is not the only reason CHV's takings claim is unripe. The crux of CHV's takings claim is the allegation that the Board's decision denied CHV a fair return, but CHV has never made a fair return rent increase application as permitted by the Ordinance and Guidelines. The decision that CHV is challenging in this case involves an application based on subsections 1 through 11 of Section 4704(g) of the Ordinance, under which rent increase applications are determined by consideration of eleven factors that address, *inter alia*, changes in income, changes in operating expenses and inflation, and focus on inflation-adjusted profit maintenance. (App. D-9-10; *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Board* ("*Carson Harbor II*"), 70 Cal.App.4th 281, 291; 82 Cal.Rptr.2d 569 (1999)) However, the Ordinance also provides for a fair return application for park owners who think a factor-based application will not permit a fair return. (Resp. App. 15-17, Guidelines §IV) CHV could have joined its factor-based application with a fair return application. (Resp. App. 25) But CHV did not do so and its factor-based application did not provide the information concerning CHV's investment, the rate of return being earned by CHV or the rate of return being earned by other comparable investments, particularly investments in

mobilehome parks, necessary to determine a fair return application. (Resp. App. 15-17, 25)[5] It is, therefore, impossible to know the highest rent that CHV could charge or the highest rate of return CHV could earn under the Ordinance. Thus, CHV failed to obtain a final decision concerning the application of the Ordinance to its property and its takings claim is unripe for that reason as well as for its failure to utilize state court remedies.

Finally, this case involves *res judicata* and issue-preclusion issues that would require dismissal of CHV's takings claim even if it were ripe. Neither the District Court nor the Ninth Circuit reached this issue. (App. A-14, fn.6; App. B) Thus, *if* the issues in this case are not mooted by a final judgment in the state court action, *if* CHV could be exempted from the second prong of *Williamson*, and *if* it could be held that CHV has satisfied the first *Williamson* prong, it would still be necessary to address the issue preclusion arising from *four* prior actions by CHV against the City and Board, each of which resulted in a judgment adverse to CHV. (App. B-3)

---

[5] The original version of these Guidelines was adopted in 1994 and the revised Guidelines cited herein were adopted in 1998. The statement in the Ninth Circuit opinion in this case suggesting its prior decision in *Carson Harbor Village, Ltd. v. City of Carson* ("*Carson Harbor I*"), 37 F.3d 465, 475 (9th Cir. 1994), established that the first prong of *Williamson* was satisfied by the application that is the subject of this action is mistaken. At the time *Carson Harbor I* was briefed and argued, the Guidelines providing for a fair return application had not been adopted.

CONCLUSION

This case does not present any grounds for review by this Court. It involves a routine application of the second prong of the *Williamson* ripeness test for as-applied takings claims, is consistent with decisions of the other Circuits applying the *Williamson* test, is consistent with *Williamson*, and is clearly correct. Further, this case presents no issue of national importance. CHV's claims to the contrary are based on a mischaracterization of the Ninth Circuit's decision in this case and a mischaracterization of the relevant California cases and procedures.

Moreover, there are factual and procedural issues unique to this case that make it inappropriate for review by this Court. Accordingly, the City and Board respectfully submit that the petition for writ of certiorari should be denied.

DATED: August 18, 2004

Respectfully submitted,

ROCHELLE BROWNE
Counsel of Record
RICHARDS, WATSON & GERSHON
355 South Grand Avenue,
40th Floor
Los Angeles, California 90071
(213) 626-8484

APPENDIX A

ROCHELLE BROWNE (State Bar No. 75953)
PAULA GUTIERREZ BAEZA (State Bar No. 198653)
RICHARDS, WATSON & GERSHON
A Professional Corporation
Thirty-Eighth Floor
333 South Hope Street
Los Angeles, CA 90071-1469
Telephone: (213) 626-8484
Facsimile: (213) 626-0078

Attorneys for Defendants City of Carson and City of Carson Mobilehome Park Rental Review Board

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CARSON HARBOR VILLAGE, LTD., a California Limited Partnership dba Carson Harbor Village Mobilehome Park,

Plaintiff,

v.

CITY OF CARSON, a municipal corporation; THE CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD,

Defendants.

Case No. 01-04799-RJK (RZx)

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND IN THE ALTERNATIVE FOR ABSTENTION; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

DATE: August 27, 2001
TIME: 10:00 a.m.

COURTROOM OF THE HONORABLE ROBERT J. KELLEHER (Room 840)

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 27, 2001 at 10:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Robert J. Kelleher, United States District Court Judge located in Room 840 at 255 E. Temple Street, Los Angeles, California, 90012, Defendants City of Carson (the "City") and City of Carson Mobilehome Park Rental Review Board (the "Board") will and do hereby move for an order dismissing the complaint and each of the counts therein pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and

* * *

Further, any claim by CHV that it has been denied a fair return is not ripe because CHV has not obtained a final decision concerning the rent that would be allowed under a fair return rent increase under the Guidelines. CHV has never filed such an application. (Ex. L, p. 287, § 3f); ***Williamson, supra***. *CHV* should not be able to decline to file a fair return application and withhold information concerning its return in the proceedings before the Board and then seek § 1983 damages for denial of a fair return rent. As ***CHV 5*** (70 Cal.App.3d at 291) and the Guidelines (Ex. B, p. 7, § IIB) explain the factor based rent increase application process unitized by CHV protects gross profit levels by adjusting the profit level upward, after subtracting reasonable operating and maintenance expenses, based on the increase in the CPI, or a portion thereof, since the last rent increase hearing to adjust for inflation. While that process estimates fair return it is not the same thing as fair return (***Kavanau II***, 16 Cal.4th at 777-778, and CHV had the right, which it did not pursue,

to join a fair return application with its factor based, gross profit maintenance application.

* * *

APPENDIX B

C.A. No. 02-56213

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARSON HARBOR VILLAGE, LTD.,
a Limited Partnership dba Carson Harbor
Village Mobile Home Park,

Plaintiff-Appellant,

vs.

CITY OF CARSON, a Municipal Corporation, et al.,

Defendants-Appellees.

CARSON HARBOR VILLAGE MOBILEHOME PARK
HOMEOWNERS ASSOCIATION, Real Party in Interest,

Defendant.

APPELLEE'S ANSWERING BRIEF

On Appeal From The Judgment of the
United States District Court, Central District of California
The Honorable Robert J. Kelleher
U.S.D.C. No. CV 01-4799 RJK

ROCHELLE BROWNE, STATE BAR NO. 75953
PETER M. THORSON, STATE BAR NO. 83088
RICHARDS WATSON & GERSHON
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071-3101
(213) 626-8484
(213) 626-0078 (fax)

Attorneys for Defendant-Appellee
CITY OF CARSON

* * *

property and CHV itself labels Counts 2 and 6 as takings claims. In these circumstances, all of CHV's claims under § 1983, whether labeled as substantive due process, procedural due process or equal protection, are unripe because CHV has admittedly not utilized state court compensation remedies.[6] In fact, CHV's § 1983 challenge to the Board's 1998 rent increase decision, which CHV labeled a substantive due process claim, was dismissed by this Court for lack of subject matter jurisdiction precisely because CHV had not utilized state court compensation remedies. (*CHV 7*, City Excerpts: 318-319)[7]

* * *

---

[6] The District Court declined to apply these authorities to CHV's equal protection and procedural due process claims and dismissed them for failure to state claims. As discussed in Parts VII and VIII, *infra*, that ruling on the merits was clearly correct. However, the City submits these claims should also have been dismissed as unripe because they all challenge the same Board decision and treating them as ripe could have the very same result as that criticized by this Court in *Armendariz, i.e.*, it would allow CHV to proceed in federal court on a clearly unripe takings claim and, thus, bypass state court compensation remedies. *Id.*, 75 F.3d at 1325-26 (overruling that result in *Sinuloa Homeowners Ass'n v. Simi Valley*, 882 F.2d 1358 (9th Cir. 1989)).

[7] The District Court did not reach the City's claim that CHV's allegation that it has been denied a fair return, which is the basis for the takings claim and the substantive due process claim, are unripe because CHV never made a fair return rent application so that there is no basis for determining what would be the highest rent allowed to CHV under the Ordinance. (*See* City's moving papers, City's Excerpts: 24). However, CHV's failure to seek a fair return increase is yet another ground on which this Court could affirm the District Court's dismissal of CHV's takings and substantive due process claims as unripe.

APPENDIX C

Excerpts of the Guidelines for Implementation of the Mobilehome Space Rent Control Ordinance

These Guidelines are intended to assist the Board in implementing the Ordinance. However, the purpose of the Ordinance and the provisions of the Ordinance are controlling.

I. Purpose and General Principles

A. The purpose of the Ordinance is to protect the homeowners who rent spaces in mobilehome parks in the City from excessive rents and to allow Park Owners to earn a "just and reasonable" or "fair" return on investment. Mobilehome owners ("homeowners") are a uniquely vulnerable group of tenants due to the investment made in purchasing and maintaining their homes and the high cost and difficulty involved in attempting to move a home. Additionally, many of the homeowners in the City are seniors on fixed incomes and many have low or moderate incomes. Unlike apartment tenants, homeowners cannot just pack their personal belongings and move if rents increase to a level they cannot afford. In order not to lose the considerable investment made in purchasing and maintaining their homes, they must either sell their home in place in the park or move their home if they cannot afford the rent. However, it is very costly to move a home and even when vacant spaces are available in the surrounding area, the parks having those vacant spaces often restrict them to rental by new mobilehomes and will not accept homes being relocated from another park. Thus, moving the mobilehome is not generally a feasible alternative. A homeowner who can no longer afford the rent must

sell the home quickly to avoid being evicted or defaulting on the mortgage on the home. However, excessive rents make a home difficult to sell and often require the homeowner to sell the home at a price which is insufficient to allow recovery of the investment made in the home.

B. Prior approval of the Board is required before any rent increase may be charged unless a specific exception is provided in the California Mobilehome Residency Law, Civil Code § 798, et seq. That Law exempts spaces subject to long term leases meeting its requirements from local regulation. It also exempts increases in utility charges under certain circumstances and exempts newly constructed spaces, as defined by the Mobilehome Residency Law.

C. The Ordinance assumes that the profit earned by park owners when the Ordinance was adopted provided a fair return because it was based on rents chosen by the owners prior to regulation. (see §I(F) re rebutting this assumption) The Ordinance, therefore, uses the factors in § 4704(g) to focus on changes in a park's income, expenses and circumstances, including changes in the general economy, to determine whether a rent increase is appropriate to allow the owner to keep earning a fair return, and when a rent increase is appropriate to determine the amount of that increase. The factors also require the Board to consider any changes in the maintenance, services and amenities provided and rents for spaces in comparable mobilehome parks in the City and any change in the Consumer Price Index ("CPI") since the last hearing on an application by a park. A decrease in, or elimination of, services, maintenance or amenities may constitute a de facto rent increase in violation of the Ordinance and increases in the CPI may, in certain circumstances, indicate

the need for a rent increase to offset the erosion of profit by inflation.

D. No one factor in the Ordinance is determinative and the factors must be considered together and balanced in light of the purposes of the Ordinance and all the relevant evidence. The Ordinance does not mandate the use of any formula or guarantee increases equal to the increase in the CPI, or any percentage of the CPI.

E. Each park owner had the right to rebut the assumption that the rents set before the Ordinance was adopted provided a fair return when the park owner applied for the park's first rent increase, but cannot challenge the decisions of the Board except by legal challenge as provided in Ordinance §4708(c). When the Board grants a rent increase it is making a determination that the rent approved is "fair, just and reasonable." In other words, the Board determined that the rent approved was not excessive and allowed the park owner a fair return. The Board cannot reconsider its decisions on a rent adjustment application after they have been embodied in a formal written resolution setting forth the findings of the Board. Therefore, each rent increase application after the first application is evaluated only on the basis of changes in income, expenses, profit, the CPI, maintenance, amenities and services that have occurred since the date of the last increase approved by the Board. A park owner or homeowner who wishes to challenge the decision may do so by seeking review in the courts, as set forth in §4708(c) of the Ordinance.

F. Notwithstanding Section D above, each park owner has the right to apply for an increase on the ground that existing rents do not allow the park owner to earn a

fair return, as set forth in §IV below, in addition to an increase based on the factors in § 4704(g).

II. Income, Operating Expenses And Profit

A. An applicant must provide the most current data which is reasonably available concerning its income, expenses and profit. In general, an application should include expenses, income and profit documentation for all years subsequent to those for which data was supplied with the last application through at least six months prior to the date of the application. An application that does not provide income, expense and profit data for the period between the date of the data submitted for the last increase application through six months prior to the date of the current application will be deemed incomplete unless satisfactory reason is shown why such data cannot be supplied. (For example, records destroyed by fire, flood, etc., new owner cannot obtain files going back to date of last application.) The necessary data may be provided by calendar year, fiscal year or any other 12 month period selected by the applicant provided that the same 12 month period is used for all data supplied and the applicant utilizes the same 12 month period (e.g., July 1, 1993 through June 30, 1994, January 1, 1993 through December 31, 1993, April 1, 1993 through March 31, 1994) each time it applies for a rent increase. If an applicant changes the 12 month reporting period used, the applicant will have to supply calendar year data for the years since the last increase as well as data presented according to the newly selected 12 month reporting period.

1. Income includes rents, fees for services not included in the rent such as RV parking, cable TV, security,

etc., and any other income derived from the Park. Income from utilities is not income within the meaning of the Ordinance. No fee may be charged in addition to the rent for a service that was included in the rent charged when the Ordinance was adopted, except as otherwise provided in the Mobilehome Residency Law.

2. Examples of operating expenses are taxes, utility costs paid to a public utility if not billed separately, maintenance (except maintenance of utilities which is to be paid for from utility income pursuant to PUC ruling), repairs, management and accounting services. All expenses may be reviewed for reasonableness.

a. Owner performed labor is generally an allowable operating expense so long as the amount and type of labor performed is documented and is not duplicated by expenses paid to others.

b. Fees paid to management companies not in excess of 5% of gross rents are generally allowable; higher fees are not generally allowed unless justified by the applicant. Costs incurred for resident managers are allowable in addition to off-site management expenses so long as there is no evidence of duplication of services.

c. Land lease payments are generally an allowable operating expense only when paid to a landowner other than the park owner. Lease payments made by a park owner to an entity owned by the park owner will generally be deemed profit rather than an operating expense.

d. Debt service incurred prior to adoption of the Ordinance to purchase or operate the park is generally an allowable operating expense.

e. Debt Service necessarily incurred to operate the park after adoption of the Ordinance is generally an allowable operating expense if the financing arrangements were prudent and consistent with customary business practice.

f. Debt service incurred after adoption of the Ordinance to purchase a park may be an allowable operating expense if the purchase price paid was reasonable in light of the rents allowed under the Ordinance and involved prudent and customary financing practices. An applicant shall have the burden of establishing the reasonableness of the purchase price and financing procedures. If the applicant relies on an appraisal, the appraiser must be available for questioning at the hearing. Any other person relied upon must also be available at the hearing. When it is determined that some increase in debt service was reasonably necessary to acquire the park, but that the amount incurred was not reasonable in light of the Ordinance and customary and prudent financing practices, then only the appropriate portion of the debt service incurred may be allowed as an operating expense. The reason for these general rules is that passing on increased debt service due to purchases at prices above those that can be justified by the income earned by the park under rent control or incurred by unusual financing methods, such as 100% financing, would defeat the purpose of rent control.

g. Debt service incurred in making capital improvements to a park may be recovered pursuant to the Capital Improvement Rent Increase provisions set forth below and is not an allowable operating expense.

h. Principal payments on a mortgage are not an allowable operating expense.

i. Reasonable attorneys' fees directly incurred in operating a park are generally allowable operating expenses. Attorneys' fees incurred in presenting applications to the Board, for enforcing court rules or for eviction are examples of fees that are allowable operating expenses. Examples of attorneys' fees which are not allowable are those incurred in connection with challenging the Ordinance or decisions of the Board or in connection with litigation seeking to recover damages or reimbursement from third parties or the City.

j. Charitable and political contributions are not allowable operating expenses.

k. If the operating expenses submitted for a park show a significant increase in expenses which is not due to the increased cost of regular operating expenses, is for an item which is not normally recurring, or is due to accumulating significant expenses in a single year instead of spreading them pursuant to a regular maintenance schedule, or if the expenses for a year are unusually low, the Board may consider the average of the park's last three years of expenses. The Board may consider the pattern of a park's income and expenses instead of focusing on the income and expenses for a single year in order to avoid unreasonable results.

l. An operating expenditure which covers expenses for more than one year may be pro-rated over the years to which it is attributable even if the cost thereof is paid all in one year in order to avoid unreasonable results. An example of such an operating expense is an insurance premium which covers two or three years. An operating

expense which is financed shall also be pro-rated over the life of the loan by which it was financed.

B. *Gross Profits Maintenance Analysis.* In evaluating a rent increase application, the Board may consider, in addition to the factors specified in §4704(g) of the Ordinance, a "gross profits maintenance analysis," which compares the gross profit level expected from the last rent increase granted to the park prior to the current application ("target profit") to the gross profit shown by the current application. This analysis will be included in the staff report to the Board in addition to analysis concerning the eleven factors when there is sufficient data to permit such an analysis.

The analysis is intended to provide an estimate of whether a park is earning the profit estimated to provide a fair return, as established by the immediately prior rent increase, with some adjustment to reflect any increase in the CPI. The analysis is an aid to assist the Board in applying the factors in the Ordinance and is to be considered together with the factors in §4704(g), other relevant evidence presented and the purposes of the Ordinance. The analysis is not intended to create any entitlement to any particular rent increase.

III. Comparable Parks and Changes in Services, Maintenance and Amenities

A. Comparable Parks. The Ordinance directs the Board to consider rents in comparable parks in the City. Consideration of the rents for spaces in comparable mobilehome parks can assist the Board in determining the range of reasonable rents for a particular park. The reason the Ordinance specifies parks in the City is that comparison to

rents in parks outside the City which are not subject to rent control would promote the excessive upward pressure on rents that the Ordinance is designed to avoid. Rents in unregulated markets are the result of the unequal bargaining power which arises from the shortage of spaces for relocating homes and the cost and difficulties inherent in trying to relocate a home. The Ordinance is designed to prevent the excessive rents that can occur in such a market absent regulation. Even if evidence were submitted showing a park in a neighboring jurisdiction with rent control to be comparable in quality, amenities, services and location, evidence would be required concerning the nature of the rent control regulations in effect in that jurisdiction during the period from 1979 to the present before the Board could determine whether the park was comparable within the meaning of the Ordinance. Parks subject to the Los Angeles County mobilehome rent regulation ordinance have not been subject to rent regulation at all times since the adoption of the Carson Ordinance and were not and are not now subject to similar rent regulation. Therefore, rents in spaces in parks in unincorporated areas of Los Angeles County are not comparable within the meaning of the Ordinance. Newly constructed spaces, as defined by the Mobilehome Residency Law, are also not comparable spaces within the meaning of the Ordinance even when they are located in City because the rents for those spaces are exempt from rent control and have never been subject to rent regulation.

B. *Changes in Park Amenities, Services and Maintenance.* There is a range of rents or zone of reasonableness which will permit a fair return. Decreases in amenities, services and maintenance may indicate that a lesser increase within the zone of reasonableness is appropriate

and increases in services, amenities and maintenance may indicate that a greater increase within the zone of reasonableness is appropriate. Further, the elimination of or decrease in maintenance, services and amenities may constitute a de facto rent increase imposed without the approval of the Board in violation of the Ordinance and may, in some circumstances require a decrease in the rent increase that might otherwise be granted or the denial of a rent increase.

IV. OTHER RELEVANT EVIDENCE AND FAIR RETURN

A. The Ordinance is based on the assumption that the rents in effect before the adoption of the Ordinance provided a fair return and park owners attempted to rebut that presumption when they first applied for an increase. Most applications submitted to the Board have been based on the factors in the Ordinance and Park Owners rarely offer evidence concerning their investment in a park, the return being earned on the park or the return being earned by comparable mobilehome parks. However, an applicant may file an application based on the claim that a rent increase is necessary because the park cannot earn a fair return without an increase greater than that permitted by application of the factors in the Ordinance as well as on the grounds provided by the factors in the Ordinance. Such an application must be made at the same time as a regular rent increase application and must include the following information, including supporting documentation and testimony, as well as the information concerning income, expenses and profit which is ordinarily required:

1. The date the applicant purchased the park and the purchase price of the park. If the park was purchased after the adoption of the Ordinance, the applicant shall also provide the rents charged, the net operating income of the park prior to the purchase and an appraisal of the park at the time of purchase. Net operating income means gross income minus allowable operating expenses (as set forth above) minus debt service. The appraiser performing the appraisal and preparing any appraisal report will be required to attend the hearing on the rent increase application.

2. Any down payment made upon purchase of the park and the total amount of equity in the park on the date of the application. Any refinancing of the park since the date of purchase and whether the proceeds of the refinancing were used to improve the park or for other purposes.

3. Any capital improvements made to the park, the cost thereof and whether that cost was recovered by a capital improvement rent increase.

4. The Overall Rate of Return (ratio of net operating income to purchase price) being earned by comparable mobilehome parks in jurisdictions with and without rent control at the time of the application. The Overall Rate of Return being earned by the applicant's park (after making any adjustments to the purchase price necessary as a result of purchase after the adoption of rent control). Other measures of the rate of return being earned on the applicant's park and comparable parks and other evidence considered relevant by the applicant may also be submitted, but the Board is concerned with return on investment. It will not consider return based on the

current fair market value of a park or the value of park property for purposes other than use as a mobilehome park. Any expert relied upon concerning the return being earned by the applicant or comparable parks or investments must be available for testimony and questioning at the hearing. Since mobilehome parks are unique investments, it is unlikely that the return on other types of investments would be found relevant by the Board. Thus, the return on investments which do not have the potential for appreciation in value are not relevant. Similarly, comparison to the return being earned by other residential rental property is not likely to be relevant since the owners of such properties must maintain the actual housing units whereas the owners of mobilehome parks do not have this responsibility or expense because mobilehome owners are responsible for maintaining them and the spaces which they rent. The owners of apartment complexes incur expenses in re-renting vacant units which are not incurred by mobilehome park owners and apartment owners experience a much higher vacancy rate. In the case of mobilehome parks, the existence of a vacant space is uncommon since homes are usually sold in place and rent is generally paid on a space so the home can remain on the space until it is sold even if the owner has moved out. Further, the residents of mobilehome parks invest in improvements which enhance the applicant's investment and this does not occur in other types of residential rental properties.

* * *

APPENDIX D

RESOLUTION NO. 2001-212

A RESOLUTION OF THE CARSON MOBILEHOME PARK RENTAL REVIEW BOARD GRANTING A RENT INCREASE FOR CARSON HARBOR VILLAGE MOBILEHOME PARK

THE CARSON MOBILEHOME PARK RENTAL REVIEW BOARD DOES HEREBY FIND, DECLARE AND ORDER AS FOLLOWS:

Section 1. An application was filed by Carson Harbor Village Mobilehome Park, 17701 S. Avalon Boulevard, Carson, California, hereinafter referred to as the "Park," requesting rental increases ranging from $222.65 to $240.73 per space, per month for 407 of the 420 spaces in the Park. Two of the spaces are used for management purposes and eleven of the spaces in the Park were constructed after January 1, 1990 and are, therefore, exempted from the City's Mobilehome Park Space Rent Control Ordinance by the Mobilehome Residency Law.

Section 2. Notice by the City that the rent increase application was substantially complete was sent to the Applicant and the affected residents on October 31, 2000. The notice advised the residents that the application was available for review and that they had 30 days from the date of the notice to submit written comments concerning the application. The time to submit comments was thereafter extended to December 11, 2000 due to mailing problems. Notice of the time, date and place of the hearing before the Board on January 10, 2001 was mailed to the Applicant and the affected residents on December 21, 2000. The hearing was opened on that date and continued to February 28, 2001 at the request of the Applicant who

waived the time limit for decision set by the Ordinance to facilitate the requested continuance. Notice of the continued hearing was mailed to the Applicant and the affected residents on February 13, 2001 the Staff Report was made available to the Applicant, the affected residents' representative and the public on or before February 22, 2001 and the hearing was duly held before the Carson Mobilehome Park Rental Review Board on February 28, 2001.

Section 3. Based upon the evidence received at the hearing, both oral and written, the Board hereby finds:

a. A general rent increase application for the Park was last heard by the Board approximately sixteen (16) months ago on October 27, 1999.

b. The Consumer Price Index for All Urban Consumers in the Los Angeles-Anaheim-Riverside Metropolitan Area (the "CPI") increased 3.74% from September of 1999, the date of the CPI figure used at the last rent increase hearing, through December 2000, the latest date for which the City had figures for the CPI when the Staff Report was prepared. The rent increases requested by the Applicant would constitute increases of 48.14%.

c. (1) The rents at Colony Cove Mobile Estates, the park in the City found to be the most comparable to the subject Park, range from approximately $321 to $428 per space, per month and average approximately $389. They are lower than the rents at the subject Park, which range from $462.50 to $500.07, average $466.14, and are the highest space rents for spaces subject to the Carson Mobilehome Space Rent Control Ordinance. Colony Cove and the subject Park are similar in design and size and have similar amenities, but the subject Park is approximately three years newer than Colony Cove and has

amenities superior to those in Colony Cove. The subject Park contains only double-wide and larger homes, whereas Colony Cove contains single-wide as well as double-wide homes. The security service in the subject Park consists of electronic gates at the entrance to the Park and no separate fee is charged for security, whereas Colony Cove imposes a separate security fee which partially offsets the cost of providing a booth with guards at the park entrance. Expenditures for maintenance have generally been greater at the subject Park than at Colony Cove and rents at the subject Park have been higher than those at Colony Cove at all times since the subject Park first opened in 1978, which was before the City's Mobilehome Space Rent Control Ordinance was adopted in 1979, and some difference in the rent levels is justified by the differences between the two Parks. At the time of the last hearing the differential had risen to approximately $95 per month, but the differential is now approximately $77 due to the subsequent $15.23 decrease in space rents required by the Mobilehome Residency Law when the Park began submetering and separately billing for water usage, which was previously included in the rent.

(2) As with prior rulings of the Board and consistent with the ruling of the court of appeal decision in *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Rental Review Board* (1999) 70 Cal.App.4th 281, the Board did not consider the rents in the Park's eleven new spaces to be rents for comparable spaces in the City's mobilehome parks because those rents are not subject to the Ordinance and the Guidelines for Implementation of the Ordinance expressly state that only spaces subject to rent control can be deemed comparable within the meaning of the Ordinance and comparing to unregulated rents would defeat

the purpose of the Ordinance. The Board also did not consider the rents in parks in neighboring portions of the unincorporated area of Los Angeles County that the Applicant claims are comparable because those parks have been unregulated during many periods when the Carson Ordinance was in effect and when those parks have been subject to rent regulation, that regulation allowed rents to rise more rapidly and in greater amounts than has the Carson Ordinance. Further, the Applicant's claim that the Board must consider the rents in these parks has been rejected by a [sic] final judgments against the Applicant in *Carson Harbor Village, Ltd. v. City of Carson,* Los Angeles Superior Court Case No. BS029436 and Second District Court of Appeal Case No. 2nd Civil B095486.

d. (1) The subject application is based on the Park's 1999 operating expenses and income. The Park's operating and maintenance expenses, including taxes and utilities, increased by $54,450 from 1998 to 1999. The Park's gross income increased by $2,911 during that period and its gross profit decreased by $51,539 during that period. Consistent with the Board's prior decisions and the court of appeal decision in *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Board* (1999) 70 Cal.App.4th 281, these income and expense figures include those attributable to the eleven non-rent controlled spaces because those spaces are an integral portion of the Park, utilize the same amenities as the rest of the Park and are part of Applicant's interest in the entire Park.

(2) Some of the expenses claimed by the Applicant for legal services were not allowed as operating expenses by the Board because those legal services were not provided in connection with operation of the Park and instead involved lawsuits challenging decisions of the

Board, a lawsuit by the Applicant seeking to recover the cost of cleaning up the Park's marsh area from the City of Carson, the City of Compton, Unocal, Caltrans and others and suits against the Park's insurer. The legal fees claimed by the Applicant were therefore reduced as shown at pages 13-14 of the Staff Report and Exhibit C thereto. The Applicant's claim that he should be able to include such fees in his operating expenses was rejected by the court of appeal in *Carson Harbor Village v. City of Carson Rental Review Board,* (1999) 70 Cal.App.4th 281. However, legal fees in the amount of $163,087 incurred in connection with presenting a rent increase application and operating the Park are included in the operating expenses allowed for 1999.

(3) Some expenses claimed by the Applicant were not included because they involve capital improvements rather than operating and maintenance expenses. While the Applicant objected that some of the expenses included should have been allowed as operating expenses, they were part of major renovation of the streets, including asphalt replacement, the clubhouse and the mobilehomes used for the Park managers and are therefore capital improvements under Guidelines §VI(A)(2). While these expenses, which are shown in Exhibit G to the Staff Report, are not included as operating expenses in this application, the Applicant can seek a capital improvement rent increase based on those expenses in addition to the general rent increase sought in this application. The Applicant was given the opportunity to present that capital improvement application at the same time as this application, but chose to defer that application. (See Exhibit B-85 to the Staff Report)

(4) The expenses claimed by the Applicant for demolition of the bridge over the Park's marsh area, as shown in Exhibit H to the Staff Report, were not allowed as operating expenses because removal of that bridge was a violation of the special use permit under which the Park operates, as found by the City at a prior public hearing. A notice of violation was recorded by the City against the Park and a copy of the notice is attached to the Staff Report as Exhibit E. The closure of the bridge was a decrease in the Park's amenities and was a factor in denying a prior rent increase application, as set forth in Board Resolution No. 99-207, a copy of which is attached to the Staff Report as Exhibit F-3. Only reasonable operating and maintenance expenditures are allowable and expenditures incurred in violation of the permit under which the Park operates are not reasonable. Although, the Applicant claimed that demolition of the bridge was mandated by the state, the letter from the state offered by the Applicant to support this claim, which is Exhibit B-49 to 50 to the Staff Report, states that the bridge should be replaced or repaired because it had become unsafe; it does not state that the bridge should be demolished.

(5) As with past applications and as set forth in the Staff Report at page 4 and Exhibits C-2 and C-56, some of the loan interest claimed by the Applicant has not been allowed because the loans at issue, or parts of them, were not incurred for acquisition of the Park or were not used for the operation, maintenance or improvement of the Park. In addition, the Board disallowed the portion of a loan fee incurred to refinance the Park in 1997 and the portion of the interest attributable to the October 1997 interest on the Park's prior first deed, which were claimed as 1999 operating expenses in addition to the interest in

the monthly payments on the new loan that was paid in 1999. The Applicant chose to include the loan fee and October 1997 interest in the principal of the new loan so that the only interest expenditures made by the Applicant in 1999 in connection with the new loan are the monthly payments on the new loan. The interest portion of those payments, which is an interest expense actually paid in 1999, was allowed as an operating expense. Under the Guidelines principal payments are not allowed as operating expenses. The Park has been refinanced several times and each time the Applicant has included any loan fee incurred at the time of refinancing in the principal of the new loan as part of the refinancing and the Applicant has avoided paying these loan fees in full because each time the Park has been refinanced again before the amount of the principal attributable to the loan fee has been repaid.

(6) Some of the expense claimed by the Applicant in connection with improvements to the Park's water distribution system were not allowed as operating expenses, as shown on Exhibit H to the Staff Report, because the Park is sub-metered and the residents pay a ready-to-serve fee and higher use rate than the Park pursuant to the tariffs set by the Public Utility Commission to establish a fund for maintenance, repair, improvement and replacement of the water system. Therefore, expenses for those purposes are to be paid out of the fund and are not allowable as operating expenses or as a capital improvement expense.

(7) A summary of the expenses disallowed by staff is set forth in Exhibits C-5 to C-10.

e. The Park is well maintained and contains a large recreation building with an exercise and crafts room, a

billiards room, an auditorium, a TV room, a kitchen, a swimming pool, a jacuzzi, saunas and a coin-operated laundry. Sewer and trash services are provided to the residents as part of the current rent.

f. No evidence was offered by the Applicant concerning the amount of the Applicant's investment in the Park, which includes the eleven (11) new spaces, the return being earned on that investment or the return being earned by comparable mobilehome parks, as is required by the Guidelines for a fair return application.

g. The gross profits analysis, which is set forth in the Staff Report and estimates whether and to what extent the Park is maintaining its dollar profit plus some increase for inflation since the last hearing on an application by the Park, shows that some rent increase is appropriate for profit maintenance and that monthly space rent increases of $14.29, or rent increases ranging from 2.86% to 3.09% would increase the Park's annual rental income by $69,792.36 and would increase the Park's gross profit by 75% of the increase in the CPI.

Section 4. The Board finds, based upon the findings contained in Section 3 that monthly space rent increases of $14.29, or increases ranging from 2.86% to 3.09%, for 407 of the Park's spaces, as shown on Exhibit A hereto, would be fair just and reasonable. This increase may not be charged or collected until proper notice of the rent increase pursuant to the Mobilehome Residency Law has been given by the Park to the affected residents.

Section 5. Any challenge to this Resolution, and the findings set forth therein, must be filed within the 90 day statute of limitations set forth in Code of Civil Procedure

Section 1094.6 and Section 4708(c) of the Carson Municipal Code.

PASSED, APPROVED and ADOPTED this 28th day of February, 2001.

CHAIR, CARSON MOBILEHOME
RENTAL REVIEW BOARD

ATTEST:

SECRETARY

No. 04-115

Supreme Court, U.S.
FILED
AUG 26 2004

In the

Supreme Court of the United States

CARSON HARBOR VILLAGE, LTD.,
a Limited Partnership, dba Carson Harbor
Village Mobile Home Park

Petitioner,

v.

CITY OF CARSON, a Municipal Corporation;
CARSON CITY MOBILEHOME PARK
RENTAL REVIEW BOARD; and CARSON HARBOR
VILLAGE MOBILEHOME PARK HOMEOWNERS
ASSOCIATION, Real Party in Interest, .

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

DAVID SPANGENBERG
Of Counsel
Law Office of David Spangenberg
420 Hudson Street, Suite A
Healdsburg, California 95448
Telephone: (707) 473-4340
Facsimile: (707) 473-0656

R.S. RADFORD
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. THE CITY IDENTIFIES NO PROCEDURAL OR FACTUAL ISSUES THAT DETRACT FROM THIS CASE'S FITNESS FOR REVIEW 1

A. *Williamson County*'s First Prong Was Found to Be Satisfied by the Court Below, and the City Did Not Seek Review of That Ruling 2

B. Preclusion Issues That Were Not Considered Below Have No Relevance to the Fitness for Review of the Questions Presented in the Petition 2

C. CHV's Present Litigation of Its State Claims in State Court Has No Bearing on the Fitness for Review of the Questions Presented in the Petition 3

II. THE OPPOSITION BRIEF HIGHLIGHTS THE NEED FOR FEDERAL COURTS TO CLOSELY SCRUTINIZE THE *ACTUAL* AVAILABILITY AND ADEQUACY OF STATE COURT REMEDIES UNDER *WILLIAMSON COUNTY* 5

A. For This Class of Takings Claims, California's Compensation Remedy Is Not "Uncertain;" It Has Been Expressly Foreclosed 6

TABLE OF CONTENTS—Continued

Page

B. Even the Speculative Availability of Damages under 42 U.S.C. § 1983 Would Apply (If at All) Only to a *Second* Violation of CHV's Rights 8

C. Ultimately, the City Concedes That the Only "Remedy" the California Courts *Actually* Offer Plaintiffs in CHV's Position Is a (Hypothetical) Opportunity to Attempt to Collect the City's Liability for Damages from Innocent Third Parties 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Ali v. City of Los Angeles,
91 Cal.Rptr.2d 458 (Ct. App. 1999) 6

Carson Harbor Village, Ltd., v. City of Carson Mobilehome Park Rental Review Board,
Los Angeles County Superior Court Case No. BS077148, Verified Petition for Writ of Administrative Mandate, filed July 11, 2002 3

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 3

Galland v. City of Clovis, 16 P.3d 130 (Cal. 2001) 8-9

Kavanau v. Santa Monica Rent Control Board,
941 P.2d 851 (Cal. 1997) 7

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 5

San Remo Hotel L.P. v. City and County of San Francisco, 364 F. 3d 1088 (9th Cir. 2004) 5

Santa Monica Beach, Ltd. v. Superior Court,
50 Cal. Rptr. 2d 726 (Cal. App. 1996) 7

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 1-2

Miscellaneous

Berger, Michael M., *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*,
3 Wash. U. J. L. & Pol'y 99 (2000) 4

TABLE OF CONTENTS—Continued

Page

Breemer, J. David, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209 (2003) 4

Meacham, Madeline J., *The Williamson Trap*, 32 Urb. Law. 239 (2000) 4

Petitioner Carson Harbor Village, Ltd., (CHV) hereby replies to the Respondents' Brief in Opposition (Opp.) served by Respondents City of Carson, et al. (City) on August 18, 2004. The Petition for Writ of Certiorari (Pet.) in this case asks this Court to resolve a conflict among the Circuits by determining whether a federal takings claim is ripe for federal adjudication when a state supreme court has expressly foreclosed inverse condemnation as a remedy for this class of takings, Pet. at 4-11, and the courts of the state have uniformly found no takings liability in cases raising the identical type of claim. Pet at 12-15. CHV also asks this Court to revisit an important question of federal law raised but left open in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997): whether the Fifth Amendment's requirement of just compensation for a taking can be satisfied by a remedial scheme that requires the injured property owner to attempt to raise revenues from private third parties to offset the government's liability for the taking. Pet. at 15-18.

The City's Opposition highlights the urgency of these issues, and provides additional insight into why it is imperative for this Court to grant the Petition.

I

THE CITY IDENTIFIES NO PROCEDURAL OR FACTUAL ISSUES THAT DETRACT FROM THIS CASE'S FITNESS FOR REVIEW

The City's Opposition asserts "unique factual and procedural issues" that supposedly detract from the fitness of this case for immediate review. Opp. at 14-16. None of these supposed issues are in fact before this Court, and they would have no impact whatsoever on the precedential value of this case as a vehicle to resolve the important conflicts identified in the Petition.

A. Williamson County's First Prong Was Found to Be Satisfied by the Court Below, and the City Did Not Seek Review of That Ruling

According to the Ninth Circuit in the decision below, "We think it beyond question—and the City does not dispute—that Carson Harbor's regulatory takings claim satisfies the first (finality) prong of the *Williamson* ripeness test." Pet. App. A-7. The City now seeks to put this issue in dispute, claiming that "CHV failed to obtain a final decision concerning the application of the Ordinance to its property and its takings claim is unripe for that reason as well." Opp. at 16. If the City believed the above holding of the Ninth Circuit was in error, it should have filed a cross-petition for certiorari seeking review of that question in this Court. Sup. Ct. R. 12.5. Since it did not do so, the ripeness of CHV's claim under *Williamson's* first prong is established as law of the case.

B. Preclusion Issues That Were Not Considered Below Have No Relevance to the Fitness for Review of the Questions Presented in the Petition

In addition to its belated invocation of *Williamson's* first prong, the City seeks to inject arguments concerning claim and issue preclusion that were addressed by neither the District Court nor the Ninth Circuit, and are therefore not before this Court. Opp. at 16. The City implies that the pendency of these issues to be addressed on remand makes it "inappropriate" for this Court to resolve the ripeness question that is squarely presented for review. *Id.* at 14. This is an obvious non sequitur. This Court granted certiorari in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, and resolved an important federal ripeness issue notwithstanding the fact that the lower courts had yet to address "the relevance of the TDR's to the issue of whether a taking has occurred," *id.* at 739, as well as a disputed issue of valuation. *Id.* at 742. Similarly, the

Court should take up the present case to resolve an important question left unanswered in *Suitum* regarding the adequacy of California's substitute for just compensation (*see* Pet. at 15-18), regardless of how the case may ultimately fare on the merits upon remand.

C. CHV's Present Litigation of Its State Claims in State Court Has No Bearing on the Fitness for Review of the Questions Presented in the Petition

The gravamen of CHV's Petition for Certiorari is that CHV was wrongfully required, by the decision below, to pursue a due process remedy via state court mandamus proceedings as the first step in "ripening" its Fifth Amendment takings claim for litigation in federal court. *See* Petition at 1-11. With remarkable irony, the City now complains that the case is not fit for review by this Court *because* CHV has done what it was improperly forced to do by the Ninth Circuit—that is, to begin litigating an administrative mandamus claim in state court! Opp. at 14-15. Contrary to the City's implication, the important federal questions presented by the Petition are not at issue in the state mandamus action. In fact, *no* federal issue of any sort is before the state court, because CHV has expressly reserved *all* its federal claims, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).[1]

As was fully set out in the Petition, there is no possibility that the state mandamus action could result in an award of just compensation to CHV, under either the state or federal

---

[1] *See Carson Harbor Village, Ltd., v. City of Carson Mobilehome Park Rental Review Board*, Los Angeles County Superior Court Case No. BS077148, Verified Petition for Writ of Administrative Mandate, filed July 11, 2002, at 2:25-27 ("Claims under federal law that also arise as a result of the Board's actions are being pursued in federal court, and Petitioner specifically reserves all of its federal claim[s] for hearing in federal jurisdiction.")

constitutions. *See* Pet. at 4-11. Sadly, however, there is some truth to the assertion that the state proceedings might "eliminate" any opportunity for federal review of CHV's federal takings claim. Opp. at 15. The reason is well known in the literature as "the *Williamson* trap": after takings plaintiffs have been forced to divert their time and resources to the futile pursuit of a chimerical state remedy, they may be told that their Fifth Amendment claim is barred from federal adjudication under the doctrines of res judicata or collateral estoppel. *See, e.g.*, J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 240 (2003) ("Unfortunately, following *Williamson County*, many federal courts have converted the state procedures rule into a permanent jurisdictional bar by applying state rules of claim and issue preclusion."); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J. L. & Pol'y 99, 105-06 (2000) ("some courts have concluded that once state court litigation has taken place, standard doctrines of claim and issue preclusion bar any later litigation, regardless of what *Williamson County* may have said."); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 239 (2000) ("If [litigants] bring their federal claims in federal court without having first brought their inverse condemnation claims in state court, their claims will be dismissed on ripeness grounds . . . . However, if they bring their federal claims in federal court after having unsuccessfully litigated their takings claims in state court, they typically find that their claims are barred on res judicata or collateral estoppel grounds.").

Even though CHV has carefully reserved its federal claims, the decision below has not only forced it into litigation before a state judiciary that has already ruled that just compensation is not available, but now exposes CHV to the risk that its federal

constitutional claim will never be heard in federal court. The greatest injustice of this "trap" is that, if CHV's federal takings claim is ultimately barred by preclusion, CHV will not be able to secure review on the merits even by a grant of certiorari from this Court. Instead, like the property owners in *San Remo Hotel L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), CHV will be limited to seeking review of the adverse procedural holding.

This absurd state of affairs cannot be justified by any sensible conception of "ripeness," and cannot be what this Court intended in *Williamson County*.

II

THE OPPOSITION BRIEF HIGHLIGHTS THE NEED FOR FEDERAL COURTS TO CLOSELY SCRUTINIZE THE *ACTUAL* AVAILABILITY AND ADEQUACY OF STATE COURT REMEDIES UNDER *WILLIAMSON COUNTY*

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court required a heightened level of scrutiny to examine the actions of governmental entities, to determine whether there has been a violation of individual rights guaranteed by the Fifth Amendment. The Court recognized that complying with the requirements of the Takings Clause was more than a mere pleading requirement; deferential review is inappropriate when constitutional rights are at risk. *Id.* at 841.

The requirement of heightened scrutiny is no less compelling in examining the question of whether a state's judiciary *in fact* makes a meaningful compensation remedy available to victims of that state's public instrumentalities. In the case at bar, the Ninth Circuit applied the greatest possible deference to the California courts' vague representations that somehow, some day, some takings plaintiff may be awarded just compensation, through mechanisms that have yet to be

determined.[2] Although state courts must be the final arbiters of state law, it is the federal judiciary's responsibility to uphold individual rights guaranteed by the United States Constitution. When the issue is whether state courts *in fact* provide the safeguards and protections constitutionally mandated for all Americans, the absolute deference employed by the Ninth Circuit in the decision below is misplaced.

The need for meaningful review of the pronouncements of state courts concerning the remedies they *actually* make available to federal takings plaintiffs is highlighted by the sources cited in the City's Opposition Brief. As a careful review of state decisions will attest, the compensation requirement mandated by *Williamson County* for federal takings claimants in CHV's position has been absolutely foreclosed by the California Supreme Court, notwithstanding the existence of comforting dicta serving to obscure that fact.

A. For This Class of Takings Claims, California's Compensation Remedy Is Not "Uncertain;" It Has Been Expressly Foreclosed

The Opposition Brief attempts to characterize California law as merely "uncertain" on the question of whether an inverse condemnation remedy is available to CHV. Opp. at 13. But in fact, the California Supreme Court, ruling on a claim identical to CHV's, has expressly proclaimed that a rental property owner who alleges a regulatory taking based on the deprivation of a fair return by a local rent board ***"is not entitled to maintain***

---

[2] A review of the Westlaw or Lexis databases will confirm that in the entire 154-year history of the State of California, no decision of that state's supreme court has *ever* awarded or sustained an award of just compensation for a regulatory taking. Indeed, the state's high court has failed to reverse or depublish only one such award—and that case included elements of a *physical*, not just a regulatory, taking. *See Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Ct. App. 1999).

an inverse condemnation action." *Kavanau v. Santa Monica Rent Control Board,* 941 P.2d 851, 854 (Cal. 1997).

In an exercise in semantic playfulness, the City asserts that *Kavanau* was not a takings case at all, but rather a substantive due process case. Opp. at 3, 6-7. But this was the essence of the California Supreme Court's ruling in *Kavanau*—converting a takings claim into a due process claim, by holding that no just compensation remedy is available. Until this ruling, there was no doubt that Kavanau had successfully established liability against the City of Santa Monica for a regulatory taking, and the sole remaining question was the amount of just compensation due. *See, e.g., Santa Monica Beach, Ltd. v. Superior Court*, 50 Cal. Rptr. 2d 726, 732 n.3 (Cal. App. 1996) (the appellate panel that ruled on Kavanau's initial claim characterizes his case as one in which "a taking was already determined in a judicial proceeding and the only remaining issues would be whether that taking was the result of a regulation which did not meet the standards articulated in this opinion and, if it did not, the amount of damages to which Mr. Kavanau is entitled.").

The City further seeks to avoid the impact of *Kavanau* by characterizing that decision as holding merely that "no taking" could occur on the facts of that case (or in the case at bar), rather than its straightforward statement that inverse condemnation is not available as a remedy in such cases. Opp. at 8. But regardless of whether *Kavanau* is interpreted as foreclosing inverse condemnation or ruling that no taking will be found on these facts as a matter of law, *Williamson County's* second prong would be deemed waived for futility everywhere but in the Ninth Circuit.

B. Even the Speculative Availability of Damages under 42 U.S.C. § 1983 Would Apply (If at All) Only to a *Second* Violation of CHV's Rights

The City asserts, without supporting quotation, that *Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001) provides "that a landlord can state an inverse condemnation claim against the government under state law," Opp. at 8, and again, "*Galland* provides . . . [that] an inverse condemnation or a takings claim can be brought against the governmental agency." Opp. at 13. With all respect, the City is apparently referring to a section of the *Galland* opinion written in invisible ink; no such statements are found anywhere in *Galland*. On the contrary, the California Supreme Court in *Galland* repeatedly confirmed that a claim for inverse condemnation is unequivocally "***precluded***" in California, for plaintiffs in CHV's position. *Galland*, 16 P.3d at 134, 143.

In speculative dicta, *Galland* hints that damages (as opposed to just compensation) *might*, under certain circumstances, eventually be available to rental property owners —but not as a remedy for the taking alleged by CHV. Specifically, *Galland* speculates that *if* an injured property owner (1) successfully pursues a *due process* remedy of invalidation, *and* (2) returns to the Rent Board to initiate a second, duplicative administrative proceeding based on the same rent application the Board had previously denied, *and* (3) somehow succeeds in obtaining a new final determination granting not only the fair return that was previously denied, but enough in addition to offset the damages inflicted by the Board's prior denial, *and* (4) determines, after the passage of an unspecified time, through some unspecified process of evaluation, that the private third parties from whom the damages are to be recovered are unable or unwilling to pay off the Board's liability, *then* (5) such an owner *might* (or might not) be allowed to seek damages in state court under 42 U.S.C.

§ 1983. *Galland*, 16 P.3d at 148. But of course, that would be a different case.

At the present time, CHV has a fully ripe regulatory takings claim against the City under *Williamson County's* first prong—the Rent Board has reached a final determination and has no further discretion in the matter. CHV has suffered serious economic injury and interference with its investment-backed expectations. Yet it is undeniable that for *this* injury, as CHV presently stands before the Court, the State of California does not provide an inverse condemnation remedy. To the extent the City claims inverse condemnation is presently available to CHV, the City simply misstates the law.

C. Ultimately, the City Concedes That the Only "Remedy" the California Courts *Actually* Offer Plaintiffs in CHV's Position Is a (Hypothetical) Opportunity to Attempt to Collect the City's Liability for Damages from Innocent Third Parties

Ultimately, the City is forced to concede that—notwithstanding dicta concerning the "uncertain" or "speculative" availability of a damages remedy that has in fact never been made available to any party—CHV's only hope of being made whole lies in its ability to collect the City's liability from private third parties. *If* CHV were to obtain a writ invalidating the final determination that forms the basis of its takings claim, and *if* thereafter it somehow convinces the Rent Board to reach a new final determination that would not only provide CHV with a fair return, but provide for increasing rents sufficiently to recover the monetary equivalent of the damages inflicted by the Board's original action, the City believes the Fifth Amendment would be satisfied. Opp. at 14.

The City's offhand comment to the effect that there will always be people living in mobile home parks who can be pressed into service to pay its debts (Opp. at 10-11) is striking

in its callous disregard of the burdens the City is willing to shift onto parties who in all likelihood received no benefit from the taking, and certainly played no role in the official decision that violated CHV's constitutional rights. More significantly, the City is simply wrong in asserting that "just compensation" need not be paid *by the government* in order to satisfy the Takings Clause. The City seeks to distinguish the authorities CHV advanced on this point on the basis of trivialities—whether a case involved a physical versus a regulatory taking, for example, or was brought under the Tucker Act. Opp. at 14. But such quibbling misses the point. As amicus Western Manufactured Housing Communities Association pointed out in its Brief Amicus Curiae in Support of Petition for Certiorari (WMHC Brief), "[a]llowing the constitutional wrongdoer to shift liability to innocent third parties is no way to enforce a constitutional right." WMHC Brief at 14. The City's intransigence on the propriety of shifting its liability for compensation onto others emphasizes the need for this Court to grant certiorari to address this independent issue, which was raised but left unresolved in *Suitum*.

CONCLUSION

For all the reasons stated above, and for the reasons set out in the Petition and in the amicus brief of the Western Manufactured Housing Communities Association, the Petition for Certiorari should be GRANTED.

DATED: August, 2004.

Respectfully submitted,

DAVID SPANGENBERG
Of Counsel
Law Office of David Spangenberg
420 Hudson Street, Suite A
Healdsburg, California 95448
Telephone: (707) 473-4340
Facsimile: (707) 473-0656

R.S. RADFORD
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Petitioner

(3)

Supreme Court, U.S.
FILED
AUG 18 2004
OFFICE OF THE CLERK

No. 04-115

In The

Supreme Court of the United States

CARSON HARBOR VILLAGE, LTD.,

Petitioner,

v.

CITY OF CARSON, CALIFORNIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

MICHAEL M. BERGER*
BERGER & NORTON
**Counsel of Record*
12121 Wilshire Blvd.
Suite 1300
Los Angeles, CA 90025
(310) 979-2500

TABLE OF CONTENTS

	Page
BRIEF AMICUS CURIAE OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI	1
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
FACTUAL SUMMARY	3
ARGUMENT	6
I THE NINTH CIRCUIT HAS PRECLUDED MOBILE HOME PARK OWNERS AS A CLASS FROM THE BENEFITS OF 42 U.S.C. § 1983	6
II CALIFORNIA'S MAVERICK FIFTH AMENDMENT JURISPRUDENCE PROVIDES NO REMEDY FOR PROPERTY OWNERS, LEAVING THE FEDERAL COURTS AS THE ONLY FORUM CAPABLE OF PROVIDING PETITIONER RELIEF	11
III AS A MATTER OF POLICY, A STATE PROCEDURE THAT REDUCES THE HOUSING SUPPLY – PARTICULARLY A KIND OF HOUSING NEEDED BY LOW INCOME FAMILIES – CANNOT BE CONDONED	15
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1994) (*en banc*) 7

Bank of U.S. v. Deveaux, 5 Cr. (9 U.S.) 87 (1809) 10

Burnett v. Grattan, 468 U.S. 42 (1984) 8

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 7, 18

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998) 7

Dolan v. City of Tigard, 512 U.S. 374 (1994) 13

Felder v. Casey, 487 U.S. 131 (1988) 3, 9

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 2, 11, 13

Galland v. City of Clovis, 16 P.3d 130 (2001) 4, 6, 14

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 8

Greenwood v. Peacock, 384 U.S. 808 (1966) 10

Heck v. Humphrey, 512 U.S. 477 (1994) 7

Inyo County v. Paiute-Shoshone Indians, 123 S.Ct. 1887 (2003) 8

Jefferson v. City of Tarrant, 522 U.S. 75 (1997) 7

Kalina v. Fletcher, 522 U.S. 118 (1997) 8

TABLE OF AUTHORITIES – Continued

Page

Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997) 4, 5, 6, 14

Lake Country Estates v. Tahoe Reg. Plan. Agency, 440 U.S. 391 (1979) 8

Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304 (1816) 10

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) 8

McNeese v. Board of Education, 373 U.S. 668 (1963) 9

Mitchum v. Foster, 407 U.S. 225 (1972) 8, 9

Monell v. Department of Social Services, 436 U.S. 658 (1978) 7

Monroe v. Pape, 365 U.S. 167 (1961) 8, 10

Nollan v. California Coastal Commn., 483 U.S. 825 (1987) 2, 11, 13

Owen v. City of Independence, 445 U.S. 622 (1980) 14

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 3, 9

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) 12

Santini v. Connecticut Haz. Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2003), *cert. pending* 7

CONSTITUTIONS

U.S. Const. amend. V ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1441 16

42 U.S.C. § 1983 ..... 3, 6, 7, 8, 10

Cal. Govt. Code § 65589.5(a)(2) 15

OTHER AUTHORITIES

Babcock & Siemon, The Zoning Game Revisited 263 (Lincoln Inst. of Land Policy 1985) 13, 15

Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 Rutgers L.J. 15 (1983) 12

Bosselman, Callies, & Banta, The Taking Issue (CEQ 1973) 12

Callies, *The Taking Issue Revisited*, 37 Land Use Law & Zoning Digest 6 (July 1985) 12

Coyle, Property Rights and the Constitution 11 (State U. of N.Y. Press 1993) 13

DiMento, *et al.*, *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 U.C.L.A.L. Rev. 859 (1980) 11

Epstein, *Rent Control Revisited: One Reply to Seven Critics*, 54 Brooklyn L. Rev. 1281 (1989) 16

Fischel, Regulatory Takings: Law, Economics, and Politics 226 (Harvard U. Press 1995) 12

TABLE OF AUTHORITIES – Continued

Page

Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A.L. Rev. 399 (1988) 16

Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)* 38B NIMLO Municipal L. Rev. 192 (1975) 12

The Report of the President's Commission on Housing 91 (1982) 16

Williams, American Land Planning Law § 6.03 (rev. 1988, supp. 2000) 12

BRIEF AMICUS CURIAE OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

The Western Manufactured Housing Communities Association has received the consent of the parties to file this brief as *Amicus Curiae* in support of the Petitioner and has filed the letters of consent with the Clerk of this Court.[1]

INTEREST OF AMICUS CURIAE

The Western Manufactured Housing Communities Association represents 1700 mobile home park operators. It is the largest such organization in California and, indeed, in the United States. The Association has a vital interest in the issues raised by this case because its members face those same issues continuously – particularly in California, where mobile home rent control ordinances are ubiquitous and the courts are inhospitable to the claims of park owners to a fair return on their investments. As shown in the Petition

---

1 Amicus states that its counsel authored this brief and Amicus paid for it. This brief was not written in whole or in part by counsel for a party, and no one other than Amicus made a monetary contribution to its preparation. (Supreme Court Rule 37.6.)

for Certiorari, the California courts provide no real remedy for park owners, making their ability to litigate their claims in federal court a necessity.

SUMMARY OF ARGUMENT

California has always marched to the beat of its own Fifth Amendment drummer. That is why its land use regulations have, for years, provided a stream of constitutional cases for this Court's decision that is out of scale, even given California's status as the most populous state in the Nation.

Twice in the space of two weeks, for example, this Court reined in the California judiciary, noting that it had been deciding just compensation cases "inconsistently with the requirements of the Fifth Amendment" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 [1987]), and that its decisions about development exactions smacked of "extortion" (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 837 [1987]) and were out of step with "every other court that has considered the question" (*Nollan*, 483 U.S. at 839).

California did not take to heart those clear messages from this Court. As shown in the Petition, it has spent the years since 1987 painstakingly evading this Court's teachings, and reestablishing its old, discredited position that landowners claiming regulatory takings of their property have no constitutional compensatory remedy.

The Ninth Circuit Court of Appeals has exacerbated the situation by closing the federal courthouse doors to aggrieved property owners who happen to own mobile home parks. Notwithstanding the total absence of a Fifth Amendment remedy in the California courts, the Ninth Circuit has banned such plaintiffs from seeking redress in federal court.

Ironically, the law the Ninth Circuit refused to enforce, 42 U.S.C. § 1983, was enacted for the specific purpose of allowing aggrieved citizens to bypass obstructionist state procedures and secure expeditious vindication of their *federal* constitutional rights. (E.g., *Felder v. Casey*, 487 U.S. 131, 138 [1988]; *Patsy v. Florida Board of Regents*, 457 U.S. 496, 503-505 [1982]. See further discussion *post*, pp. 6-10.)

It is time to call a halt. California's mobile home park owners need *some* court in which to seek vindication of their Fifth Amendment rights to compensation. California has plainly said it will not provide effective relief. That being so, the doors to the federal courthouse must be open. Certiorari should be granted to redress this constitutional lapse.

FACTUAL SUMMARY

Carson Harbor Village (CHV) owns a mobile home park, where it rents spaces to mobile home occupants. It sought permission from the City of Carson's Mobilehome Park Rental Review Board (Rent Board) to make a modest rent increase that

would allow it a fair return on its investment. The Rent Board said it would allow an increase of only *six percent of what CHV had requested.* Because such a miniscule rental adjustment meant that the rent level was not adequate to provide a fair return, CHV decided it had to sue to vindicate its Fifth Amendment right to just compensation.

CHV decided to sue in federal court for a number of reasons, including these. *First*, it believed its federal constitutional rights had been violated and that the place to seek redress was in federal court. *Second*, that belief was fortified because the cause arose in California. California courts have historically shown a hostility to the rights of property owners in general, and have largely refused to protect those rights. (See *post*, pp. 11-15.)

In the specific context of mobile home rent control, the California Supreme Court has invented a "remedial" system that not only fails to provide relief, it exacerbates the problem. (See *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 [Cal. 1997]; *Galland v. City of Clovis*, 16 P.3d 130 [2001].) Here's how it works. (1) A mobile home park owner must first seek approval of a rent increase from a body like the Rent Board. If dissatisfied, (2) the owner must appeal to the city council.[2] If still dissatisfied, (3) the

---

[2] If the city council remands to the Rent Board that, of course, would revert the process back to step one to begin again, adding more administrative steps.

owner must seek a writ of administrative mandate from the superior court to review the city council's decision.[3] If such a review determines that the denial of a rent increase was confiscatory, then (4) return to the Rent Board to seek a "*Kavanau* adjustment," i.e., an increase in future rent from future tenants that is sufficient to compensate for the increase not granted in step (1), plus interest and costs. If turned down again (by the same Rent Board that made the initially inadequate adjustment – here, allowing CHV only six percent of what it sought), then (5) appeal again to the city council.[4] If still dissatisfied, then (6) seek another writ of administrative mandate from the superior court to determine whether the result (even with a "*Kavanau* adjustment") is still confiscatory.[5]

This nightmarish process, which places mobile home park owners in a pointless and virtually endless loop, caroming among administrative agencies and courts like crazed billiard balls, is no remedy. It is a thinly disguised scheme to exhaust the owners and their bank accounts and to discourage them from even trying to protect rights guaranteed by the Fifth Amendment.

---

3 This could, of course, lead to two additional litigational steps in the court of appeal and the state supreme court – a process that consumes years.

4 See footnote 2.

5 See footnote 3.

Facing that prospect, which the California Supreme Court candidly conceded *eliminated* any right to just compensation for a Fifth Amendment taking (*Kavanau*, 941 P.2d at 854, 865, 867; *Galland*, 16 P.3d at 134), CHV sought relief in federal court.

And the federal courts, rather than throwing CHV a lifeline, slammed the door, leaving no remedy for the violation of its constitutional rights. Use the California courts, said the Ninth Circuit; the federal courts are not open for your business.

This Court's attention is needed. There is no state law remedy. Federal court access is essential.

ARGUMENT

I

THE NINTH CIRCUIT HAS PRECLUDED MOBILE HOME PARK OWNERS AS A CLASS FROM THE BENEFITS OF 42 U.S.C. § 1983

By demanding that property owners like Carson Harbor Village seek relief in the California courts under California law, the Ninth Circuit has effectively removed from that entire class of citizens the protection intended by 42 U.S.C. § 1983.

As the Petition aptly shows, ***there is no remedy available under California law for a Fifth Amendment taking under these circumstances***. (See *Kavanau*, 941 P.2d 851; *Galland*, 16 P.3d 130.)

Moreover, if a property owner seeks relief in California's courts, the Ninth Circuit will not permit later litigation of any federal claims, as due process claims will be subsumed within the takings claim (*Armendariz v. Penman*, 75 F.3d 1311 [9th Cir. 1994] [*en banc*]) and the state court takings decision will create collateral estoppel in federal court (*Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998]).[6]

Thus, the California courts have eliminated any ability for these property owners to recover just compensation for Fifth Amendment violations, and the federal courts in California have eliminated any federal avenue for redress. That makes a mockery of this Court's consistent application of 42 U.S.C. § 1983. The California courts' defiance of federal constitutional standards will have to await a certiorari petition from a California decision. The Ninth Circuit's closure of the federal courthouse doors can – and should – be remedied here.

A Section 1983 case is a "species of tort liability,"[7] a statutorily created "constitutional tort"[8]

---

6 The Ninth Circuit conflicts in these matters with, e.g., *Santini v. Connecticut Haz. Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), *cert. pending*.

7 *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

8 *Jefferson v. City of Tarrant*, 522 U.S. 75, 78-79 (1997); *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

that sweeps within its ambit all governmental actions that impair Bill of Rights protections. Section 1983 was intended to provide "a uniquely *federal* remedy"[9] with "broad and sweeping protection"[10] "to secure private rights against government encroachment,"[11] "read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"[12] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.[13] While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader" than tort law,[14] and must be broadly and liberally construed to achieve its goals.[15] Its "goals" are straightforward: "to provide

---

9 *Mitchum v. Foster*, 407 U.S. 225, 239 (1972); emphasis added.

10 *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972); quoting with approval.

11 *Inyo County v. Paiute-Shoshone Indians*, 123 S.Ct. 1887, 1894 (2003).

12 *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part in *Monell*, 436 U.S. 658, to expand government liability.

13 *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

14 *Kalina v. Fletcher*, 522 U.S. 118, 124-125 (1997).

15 *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

compensatory relief to those deprived of their *federal* rights by state actors"[16] by "interpos[ing] the *federal courts* between the States and the people, as *guardians of the people's federal rights*."[17] To effectuate those goals, Congress intended to "throw open the doors of the United States courts" to those who had been deprived of constitutional rights "and to provide these individuals ***immediate*** *access to the federal courts* . . ."[18]

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are *always* a proper subject for adjudication, and that *we have not the right to decline* the exercise of that jurisdiction *simply because the rights asserted may be adjudicated in some other forum*."[19]

This theory of protecting *federal* rights in *federal* courts dates to the founding of the Republic, and makes clear why the Ninth Circuit's decision below is historically and doctrinally mistaken. As James Madison bluntly put it, ". . . a review of the

---

16 *Felder v. Casey*, 487 U.S. 131, 141 (1988); emphasis added.

17 *Mitchum*, 407 U.S. at 243; emphasis added

18 *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 (1982); emphasis added.

19 *McNeese v. Board of Education*, 373 U.S. 668, 674, fn. 6 (1963); emphasis added; quoting with approval.

constitution of the courts in the many states will satisfy us that they cannot be trusted with the execution of federal laws."[20] This Court itself has noted that one reason for Section 1983 was to provide a federal forum *without recourse to state litigation.*

> "It is abundantly clear that one reason the legislation was passed was to afford a *federal* right in *federal* court because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by the state agency."[21]

For whatever reason, the California state courts have chosen to defy this Court's Fifth Amendment jurisprudence and strike out on their own course, one that precludes relief to victims of takings like CHV. It is unconscionable to allow the Ninth Circuit, in effect, to approve that state of affairs by relegating property owners to a system that seems designed to evade the Fifth Amendment's just compensation guarantee.

---

20 Quoted in *Greenwood v. Peacock*, 384 U.S. 808, 836 (1966) (Douglas, J., dissenting). See also *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 347-348 (1816); *Bank of U.S. v. Deveaux*, 5 Cr. (9 U.S.) 87 (1809).

21 *Monroe*, 365 U.S. at 167; emphasis added.

II

CALIFORNIA'S MAVERICK FIFTH AMENDMENT JURISPRUDENCE PROVIDES NO REMEDY FOR PROPERTY OWNERS, LEAVING THE FEDERAL COURTS AS THE ONLY FORUM CAPABLE OF PROVIDING PETITIONER RELIEF

California has created its own Fifth Amendment world by painstakingly recreating the non-remedial regime this Court so highly criticized in 1987 in *First English* and *Nollan*. (See Pet., pp. 5-10.) The Ninth Circuit cannot banish mobile home park owners (along with other property owners) to that regime to protect their constitutional rights.

Commentators from around the country – even those that generally sympathize with (or even represent) government agencies – have long recognized California's hostility to the rights of property owners under the Fifth Amendment. They have called California's attitude toward property owners "more hostile . . . than any other high court in the nation."[22] They concluded that California's

---

22 DiMento, *et al., Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 U.C.L.A.L. Rev. 859, 872 (1980). The eight highly knowledgeable authors were led by the late UCLA law professor Donald G. Hagman, the leading land use legal thinker and analyst of his time.

attitude was "extreme,"[23] "onerous [and] draconian"[24] – in short, "the most restrictive state in the country with respect to land use."[25] California's courts have applied this bias "consistently."[26]

---

23 Fischel, Regulatory Takings: Law, Economics, and Politics 226 (Harvard U. Press 1995), by a nationally recognized land economist at Dartmouth.

24 Callies, *The Taking Issue Revisited*, 37 Land Use Law & Zoning Digest 6, 7 (July 1985). The author, a professor of law at the University of Hawaii, co-wrote one of the most influential books on land use – unequivocally pro-regulation. (Bosselman, Callies, & Banta, The Taking Issue [CEQ 1973].)

25 Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 Rutgers L.J. 15, 70 (1983). The author has seen both sides, having served, at different times, as litigation counsel to the National Association of Home Builders and as Chairman of the Maryland-National Capital Park and Planning Commission (regulating land use in Montgomery County, Md.).

26 1 Williams, American Land Planning Law § 6.03 at 184 (rev. 1988, supp. 2000). Others openly gloated. See Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO Municipal L. Rev. 192-193 (1975), quoted with disapproval in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, fn. 22 (1981) (Brennan, J., dissenting, but apparently expressing the substantive views of five Justices).

This Court responded to California in 1987, with its double-barreled *First English* and *Nollan* rebuke of its Fifth Amendment jurisprudence. One would have thought that would suffice.

This Court's admonitions notwithstanding, Californians' property rights remain very much a constitutional "poor relation." (Compare *Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].) A poll of land use experts on both sides found "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities are accustomed to meeting little resistance from the state courts."[27] Two knowledgeable commentators concluded that, "[i]n California, the courts have elevated governmental arrogance to a fine art."[28]

One mechanism devised by the California courts in that process involves mobile home park rent adjustments (described *ante*, p. 4). That is the system to which the Ninth Circuit relegated CHV for constitutional relief. It can provide nothing of the sort. The system – as candidly conceded by its creators on the California Supreme Court – *will not*

---

27 Coyle, Property Rights and the Constitution 11 (State U. of N.Y. Press 1993).

28 Babcock & Siemon, The Zoning Game Revisited 263 (Lincoln Inst. of Land Policy 1985). The late Richard Babcock was then the recognized dean of the Nation's land use bar and – significantly – a vigorous defender of expansive government regulatory control.

provide any Fifth Amendment just compensation from the government agency responsible for the violation. (*Kavanau*, 941 P.2d at 854, 865, 867; *Galland*, 16 P.3d at 134.) The most it can do is permit CHV and others in the same boat to go hat in hand to the same rent controllers and city councils that have refused to provide them adequate rental adjustments in the past and beg for reconsideration.

The California system provides *no incentive to the government to provide relief*, as there is no Fifth Amendment compensation available against the regulators. (Compare *Owen v. City of Independence*, 445 U.S. 622, 651 [1980] [monetary remedy against government is a "vital component" of constitutional vindication].) Instead, even assuming the Rent Board and the city council agree that the existing rent is not adequate, all they can do is authorize CHV to attempt to make itself whole by increasing the rent in the future to future tenants who may not be willing to pay the increased rents to make up for past losses with which they had nothing to do and for which they received no benefit.

Allowing the constitutional wrongdoer to shift liability to innocent third parties is no way to enforce a constitutional right. But the Ninth Circuit has given it its imprimatur. California's system has — as noted above — become the butt of black humor on a

national scale.[29] This may not be an appropriate vehicle in which to deal with that problem, but it is surely an appropriate vehicle to tell the federal courts that sit in California that they should no longer defer to that jurisdiction's subversion of federal constitutional rights, and should provide some effective protection of the Fifth Amendment rights of property owners.

III

AS A MATTER OF POLICY, A STATE PROCEDURE THAT REDUCES THE HOUSING SUPPLY – PARTICULARLY A KIND OF HOUSING NEEDED BY LOW INCOME FAMILIES – CANNOT BE CONDONED

It is an open secret that California's supply of housing has been shrinking in relation to the growth of its population while the cost of housing has escalated. The situation is such that the State Legislature has commented on it. (Cal. Govt. Code § 65589.5[a][2] ["California housing has become the

---

[29] As Babcock and Siemon put it, "What *can* one say about the California courts other than that one has to be a madman to challenge a government regulation in that bizarre jurisdiction?" "[Why] sue a California community when it would cost a lot less and save much time if [the property owner] simply slit his throat." (Babcock & Siemon, *supra*, at 257, 293.)

most expensive in the nation"].) One of the few kinds of housing available for low income families is manufactured housing, i.e., the so-called "mobile homes" that are rarely "mobile" any more. Ending "the serious housing shortage" has been declared National policy by Congress. (42 U.S.C. § 1441.)

Ironically, as the need for housing has grown, the pressure on those who supply housing has also increased. As the dockets of both state and federal courts in California attest, ordinances like the one at issue here are proliferating. Designed to protect the interests of those who are already tenants in mobile home parks, the impact of these laws is that new parks are not being opened in sufficient numbers and park owners have less and less incentive to remain in business.

Absent efforts to control rent by municipal fiat, the market would provide additional competition — and competition would increase the housing supply while making rents tend to fall of their own accord. (See Epstein, *Rent Control Revisited: One Reply to Seven Critics*, 54 Brooklyn L. Rev. 1281, 1304 [1989].)

Economists generally agree that the unfortunate effect of rent controls like the severe illustration at bench is that it reduces the housing stock. (See, most notably, The Report of the President's Commission on Housing 91 [1982]; see, for a study of the first decade of stringent California mobile home rent control laws, Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile*

Home Context: Placement Values and Vacancy Decontrol, 35 U.C.L.A.L. Rev. 399, 463 [1988].)

In a nutshell, overzealous rent control defeats its ostensible purpose. It drives landlords out of the market, it increases housing cost, and it denies housing to those most in need of it.

This case involves not only a substantial injury to CHV (which is significant and deserves redress), and a threat of ongoing injury and frustration to this Amicus and its many members, it involves significant public policy issues as well. If state and local governments use their enormous regulatory powers not to encourage the development of much needed housing, including mobile home park housing, but to frustrate such development by making investment in it economically unfeasible, the critical need for housing – particularly affordable housing for low and middle income families – will never be satisfied.

CONCLUSION

This Court's attention is sorely needed. California's courts provide no protection to the rights of those who own property. As they will not protect those rights, the responsibility is that of the federal courts. This is all the more true in the application of a federal statute that was expressly enacted and has been consistently enforced to allow citizens direct

access to federal court for the vindication of federal rights.

This is hardly an unusual request. Indeed, it was only a few years ago that this Court acknowledged the settled practice before 1987, when regulatory taking cases in California were routinely handled in federal court *because California clearly provided no remedy.* (See *City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 699 [1999].) California has reconstructed that shameful scenario – casting itself in the role of latter-day diehard southern states invoking a doctrine they once called "interposition," using state law in an attempt (shot down by this Court) to deny constitutional rights to some of their citizens. The idea plays no better today; only the victims have changed.

Certiorari should be granted and the lower courts instructed to take jurisdiction of the merits of this case.

Respectfully submitted,

Michael M. Berger*
BERGER & NORTON
* *Counsel of Record*
12121 Wilshire Blvd.
Suite 1300
Los Angeles, CA 90025
(310) 979-2500